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Reeves

HISTORY
OF THE
ENGLISH LAW.

VOL. I.

T. DAVISON, Lombard-street,
Whitefriars, London.

HISTORY
OF THE
ENGLISH LAW.

VOL. I.

J. DAVISON, London-street,
Wholesale London.

Charles Collingridge

HISTORY
OF THE
ENGLISH LAW,
FROM THE
TIME OF THE SAXONS,
TO THE END OF
THE REIGN OF PHILIP AND MARY.

BY JOHN REEVES, ESQ.

BARRISTER AT LAW.

THE THIRD EDITION.

IN FOUR VOLUMES.

VOL. I.

LONDON:

PRINTED FOR REED AND HUNTER, LAW-BOOKSELLERS,
BELL-YARD, LINCOLN'S-INN.

1814.

HISTORY

ENGLISH LAW

TIME OF THE SAXONS

BIBLIOTHECA

REGIA

MONACENSIS

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PREFACE.

THE History which I now presume to offer to the profession of the law, is an attempt to investigate and discover the first principles of that complicated system which we are daily discussing.

It has happened to the law as to other productions of human invention, particularly those which are closely connected with the transactions of mankind, that a series of years has gradually wrought such changes, as to render many parts of it obsolete ; so that the jurisprudence of one age has become the object of mere historic remembrance in another. Of the numerous volumes that compose a lawyer's library, how many are consigned to oblivion by the revolutions in opinions and practice ; and what a small part of those which are still considered as in use, is necessary for the purposes of common business ! Notwithstanding, therefore, the multitude of books, the researches of a lawyer are confined to writers of a certain period. According to the present course of study, very few indeed look further than *Coke* and *Plowden*. Upon the same scale of inquiry, the *Year-Books* are considered rather in the light of antiquities ; and *Glanville*, *Bracton*, and *Fleta*, as no longer a part of our law.

It is in such a state of our jurisprudence that a history of the causes and steps by which these revolutions in legal learning have been effected, becomes curious and useful. But, notwithstanding the inquisitive spirit of the present age has given birth to histories of various sciences, we have nothing of this kind upon our law, except SIR MATTHEW HALE's *History of the Common Law*, published from a posthumous manuscript at the beginning of the present century. There have not, however, been wanting historical discourses, which have incidentally, and in a popular way, examined the progress of certain branches of the law, and during certain periods; such as those of *Bacon, Sullivan, Dalrymple, Henry*, and others.

SIR MATTHEW HALE, as a writer upon English law, possesses a reputation which can neither be increased nor diminished by any thing that may be said of his History. We may therefore freely observe, that it is only an imperfect sketch, containing nothing very important nor very new. What seemed most to be expected, namely, an account of the changes made in the rules and maxims of the law, is very lightly touched. In short, the early period to which this work is confined, and the cursory way in which that period is treated, scarcely serve to give a taste of what a history of the law might be.

SIR WILLIAM BLACKSTONE, though in a smaller compass, has given a plan of a much better

history than the former; and if the one excited a wish for something more complete, the other seems to have traced out a scheme upon which it might be executed. It was the chapter at the end of the *Commentaries* which persuaded me of the utility of such a work, if filled up with some minuteness upon the outline there drawn. It seemed, that after a perusal of that excellent performance, the student's curiosity is naturally led to enquire further into the origin of the law, with its progress to the state at which it is now arrived.

The plan on which I have pursued this attempt at a History of our Law, is wholly new. I found that modern writers, in discoursing of the ancient law, were too apt to speak in modern terms, and generally with a reference to some modern usage. Hence it followed, that what they adduced was too often distorted and misrepresented, with a view of displaying, and accounting for, certain coincidences in the law at different periods. As this had a tendency to produce very great mistakes, it appeared to me, that, in order to have a right conception of our old jurisprudence, it would be necessary to forget for a while every alteration which had been made since, to enter upon it with a mind wholly unprejudiced, and to peruse it with the same attention that is bestowed on a system of modern law. The law of the time would then be learned in the language of the time, untinctured with new opinions; and when that was clearly under-

stood, the alterations made therein in subsequent periods might be deduced, and exhibited to the mind of a modern jurist in the true colours in which they appeared to persons who lived in those respective periods. Upon the same reasoning, it appeared to me, that if our statutes, and the interpretation of them, with the variations that have happened in the maxims, rules, and doctrines of the law, were presented to the reader in the order in which they successively originated; such a history, from the beginning of our earliest memorials down to the present time, would not only convey a just and complete account of our whole law as it stands at this day, but place many parts of it in a new and more advantageous light, than could be derived from any institutional system; in proportion as an arrangement conformable with the nature of the subject, surpasses one that is merely artificial.

The following volumes are written upon this idea; and being, in that view, an introductory work, they will, I trust, be as intelligible to a person unacquainted with law-books, as to those of the profession. It was partly with this design that I have contented myself with a simple narrative, making few allusions to what the law became in later times, but leaving that to be mentioned in its proper place. Many inferences and discussions which seem to be suggested by our ancient laws have not entirely escaped me; but are reserved for a place to which, agreeably with the plan of this History, I thought them better adapt-

ed. Every one who looks into our old law, feels a strong propensity for remarking on the changes it has since undergone; but when the several steps which led to those changes are traced in a continued narrative down to the present time, such observations would be premature, unnecessary, and irksome.

My object being jurisprudence, and not antiquities, I have confined my researches to certain printed books of established reputation and authority, where alone I could hope to find the juridical history of the times in which they were written. It may not, perhaps, be unsatisfactory to the reader, who knows what respect is due to the venerable remains of our ancient law, to be told, that the whole of GLANVILLE, and what seemed to be the most interesting part of BRAC-
TON, is incorporated into this work.

A few observations may be necessary to prevent the reader being disappointed in that part of the following work which treats of the statutes. The old statutes have long been considered in a remote point of view; being rarely taken into the course of a student's reading, but referred to as occasion requires, and are then understood by the help of notes and commentaries. It might be expected, that a History of the Law should furnish more notes and more commentaries upon this subject, as the only known means of illustration: on the contrary, the laws of Henry III. and Edward I. are here very little more than clearly stated, in a language

somewhat more *readable*, if I may use the expression, than that of the Statute-Book.

What was before said upon the general design of the work, will, I hope, satisfy the reader that nothing further was requisite on this subject. As an account of the revolutions in our law antecedent to the making of those statutes, must, all together, contain an account of the law as it stood when they were made, it follows, that the reader enters upon them with a previous information, which will enable him to comprehend their import, on the bare statement of their contents. As to the opinions and principles that were founded on those statutes in after-ages, to take any notice of them would not only exceed the plan of the work, but very often anticipate the materials which are to contribute towards the subsequent parts of the History.

The text of our old statutes was translated in the time of Henry VIII. The ear of a lawyer, by long use and frequent quotation, has been so familiarized to the language of this translation, that it has obtained in some measure the credit of an original. Conformably with the general deference paid to this translation, I have mostly followed the words of it, except where I found it deviated from the text, or the matter required to be treated more closely, or more paraphrastically.

There is one point of juridical history which has been greatly misconceived by many. It has been apprehended, that much light might be thrown on our statutes by the civil history of the

times in which they were made; but it will be found, on enquiry, that these expectations are rarely satisfied. The *lay*-historians, like the body of the people, were as unconcerned in the great revolutions of legal learning in those days, as in ours: and we now see a statute for enclosing a common, or erecting a work-house, make no small figure in the debates of parliament; while an act for the *amendment of the law*, in the most material instances, slides through in silence. Yet the latter would become an important fact to the juridical historian, while the former was passed by unnoticed. I believe little is to be acquired by travelling out of the record; I mean, out of the statutes and year-books, the parliament-rolls, and law-tracts.

The following History to the end of Edward I. was published in one volume in quarto, in March 1783; the remainder, as far as the end of Henry VII. in March 1784. These two volumes have undergone a revision, and have received some considerable additions. I have also subjoined the reigns of Henry VIII. Edward VI. and queen Mary, or, as it is more properly stiled by lawyers, Philip and Mary. This brings us to the close of that period, which appears to be almost wholly abandoned to the researches of the juridical historian. We have passed the times of the Year-Books, and of their appendages, Fitzherbert and Brooke, the manuals of practicers in former times: we have even touched on those materials, to which the practicers

of the present day do not disdain to owe obligations. *Dyer* and *Plowden* stand among the earliest of those authorities that are vouched in *Bacon*, in *Viner*, and in *Comyns*, who rarely refer to any antecedent to the reign of Elizabeth.

At this juncture in our legal annals, between the law of former days and that of the present, we may be permitted to pause for a while. A new order of things seems to commence with the reign of Elizabeth, which strikes the imagination as a favourable point of time for resuming this historical enquiry afresh.

In pursuing the changes in our laws thus far, it is hoped, that if nothing is added to the stock of professional information, something is done towards giving it such illustration and novelty as may assist the early enquiries of the student. The investigation here made into the origin of English tenures, the law of real property, the nature of writs, and the ancient and more simple practice of real actions, may, perhaps, facilitate the student's passage from *Blackstone's* Commentaries to *Coke upon Littleton*, and better qualify him to consider the many points of ancient law which are discussed in that learned work.

JAN. 25,
1787.

J. R.

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HISTORY
OF THE
ENGLISH LAW.

THE SAXONS.

*The Laws of the Saxons—Thainland and Reveland—
Freemen—Slaves—The Tourn—County Court—Other
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ed Property—Method of Conveyance—Decennaries—
Criminal Law—Were—Murder—Larceny—Deadly
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Confessor—Saxon Laws.*

THE Law of England is constituted of acts of parliament and the custom of the realm; on both which courts of justice exercise their judgment; giving construction and effect to the former, and, by their interpretation, declaring what is and what is not the latter.

We possess many of these acts of parliament from Magna Charta 9. Hen. III. to the time of Edward III. and from thence in a regular series to the present time. The statutes, except some very few, enacted by the legislature before that period, are lost; though, no doubt, many of the regulations made by them, having blended themselves with the custom of the realm, have been received under that denomination, since the evidence of their parliamentary origin is destroyed. The custom of the realm, or *the common law*, consists of those rules and maxims concerning the

persons and property of men, that have obtained by the tacit assent and usage of the inhabitants of this country; being of the same force with acts of the legislature: the only difference between the two is this; the consent and approbation of the people with respect to the one, is signified by their immemorial use and practice; their approbation of, and consent to the other is declared by parliament, to the acts of which every one is considered as virtually a party.

The common law, like our language, is of a various and motley origin; as various as the nations that have peopled this country in different parts and at different periods. Some of it is derived from the Britons, and some from the Romans, from the Saxons, the Danes, and the Normans. To recount what innovations were made by the succession of these different nations, or estimate what proportion of the customs of each go to the composing of our body of common law, would be impossible at this distance of time. As to a great part of this period, we have no monuments of antiquity to guide us in our enquiry; and the lights which gleam upon the other part afford but a dim prospect. Our conjectures can only be assisted by the history of the revolutions effected by these several nations.

Certain it is, that the Romans had establishments in this island, more or less, from the time of Claudius; that they did not finally leave it till the year 448, A. D. and that during great part of that period they governed it as a Roman province, in the enjoyment of peace, and the cultivation of arts. The Roman laws were administered as the laws of the country; and, at one time, under the prefecture of that distinguished ornament of them, *Papinian*. When these people were constrained to desert Britain, and attend to their domestic safety, the *Picts* and *Scots* broke in upon the peaceable inhabitants of the southern parts; who, unable to resist the attack, at length applied to the *Saxons* for assistance. Several tribes of Saxons landed here, and first drove the northern invaders within their own borders;

then turned their arms against the Britons themselves; and having forced great numbers of them into the mountains of Wales, subjected the rest to their dominion, which gradually subsided into seven independent kingdoms.

The circumstances of this revolution are related to be of a kind differing from most others. The Saxons are described as a rude and bloody race; who, beyond any other tribe of northern people, set themselves to exterminate the original inhabitants, and destroy every monument and remains of their establishment. In so general a ruin, it cannot be imagined that the customs of the native Britons, or the laws ingrafted upon them by the Romans, could meet with any favour.

The kingdoms of the Heptarchy were, for a time, independent of each other; and though a like state of society and manners prevailing in all of them must of course have produced the like spirit and principle of legislation in common, yet their laws must have been specifically different. Hence grew a variety of laws among the Saxons themselves. In the reign of Alfred, the Danes, who had long harassed the kingdom, were by solemn treaty settled in Northumberland and the country of the East Angles, besides great numbers scattered all over the realm. The Danes were after this considered, in some measure, as a part of the nation. They were suffered to enjoy their own laws within their district; and these, when their own kings sat upon the English throne, pervaded, in some degree, all parts of the country.

From these various causes it happened, that Laws of the Saxons. towards the latter part of the Saxon times, the kingdom was governed by several different laws and local customs. The most general of all these were the three following; the *Mercian Law*, the *West-Saxon Law*, and the *Danish Law*. If any of the British or Roman customs still subsisted, they were sunk into, and lost in one of these laws; which governed the whole kingdom, and have since received the general appellation of *The Common Law*.

The history of this body of common law, with the divers alterations and improvements which its rules, its principles, and its practice, have received at different times by acts of parliament, and by the decisions of courts, we shall endeavour to investigate and deduce in the following History.

The great obscurity in which all inquiries concerning these times are involved, renders it impossible to trace the history of laws with much certainty. For the present, we must be content, if we can collect what were the outline and striking features of the Saxon jurisprudence in general; without entering into any nice discussion about the time and manner of the particular changes it might undergo during the long period before the Conquest.

If the law of a country is circumscribed in its extent by the bounds of a realm, much of its influence and operation depends on the internal divisions of it; and a history of the law would be incomplete without noticing the parts of a kingdom; so far, at least, as the process of legal proceeding is affected by provincial limits.

The division of England into counties is very ancient; but is said to have been reduced to its present appearance by Alfred. That great prince carried his scheme yet further; and subdivided counties into *hundreds*, and hundreds again into *tythings*. This parcelling out of the kingdom into small districts, was made subservient to the well-ordering of the police, and the due administration of justice; as will be seen presently. There was another division purely ecclesiastical. *Parishes*, and even mother-churches, were known so early as the time of king Edgar, about the year 970; for the consecration of tythes before that time being *arbitrary*, it was ordained by a law of that king (*a*), that all tythes should be paid *ecclesiæ ad quam parochia pertinet*. Besides these divisions, there was another that had reference to the conditions under which the land of every one

(a) Leg. Eadg. cap. 1.

was possessed; a division which regarded the nature, description, and incidents of landed property. On this, together with that of counties, depended the bounds and extent of judicature.

The lands of the Saxons were divided into ^{Thainland} *thainland* and *reveland*. Land granted to the ^{and Reveland.} *thains*, or lords, was called *thainland*: That over which the king's officer (called in their language *shire-reve*, since *sheriff*) had jurisdiction, was called *reveland*. Again, the former being held by charter, was otherwise called *bocland*, or *bookland*: Land of the other kind, being held without writing (probably by those who remained of the first inhabitants of the country) was otherwise called *folcland*; a distinction, which, after the feudal law was established, received other appellations of a similar import. That within the jurisdiction of the sheriff, was then called *allo-dial*: That held of lords, *feudal*. The possessors of such as has since been called allodial, were stiled, in the laws of those times, *liberi*; being subject to the king alone in his political capacity; in contradistinction to tenants under the dominion of the thains, who were called *vassals*, being subject to the controul also of their lord.

The civil state of the Saxons was of this ^{Freemen.} kind. The whole nation consisted of *freemen* and *slaves*. The *freemen* were divided into two orders, the *nobles* and the *ceorls*. The nobles were called *thanes*, and were of two kinds; the king's thanes and the *lesser* thanes. The distinction between them seems to be, that the former were next in rank to the king, and independent: the latter were dependent on the king's thanes, and seem to have occupied lands of their gift, for which they paid rent, services, or attendance in war and peace. Noble descent or possession of land were the two qualifications that raised a man to the rank of thane. The inferior rank of freemen, called *ceorls*, were chiefly employed in husbandry; so much so, that a ceorl and a husbandman became almost synonymous. These persons cultivated the farms of the

nobility, for which they paid rent; and they seem to have been removable at pleasure (a). The next order of people, and a very numerous body they were, was that of the *slaves*, or *villains*; a lower kind of *ceorls* (b), who being part of the property of their lords (c), were incapable of any themselves. These are the persons who are described by Sir William Temple, as “a sort of people who were in a condition of downright servitude, used and employed in the most servile works; and belonging, they, their children, and effects, to the lord of the soil, like the rest of the stock or cattle upon it.” However, the power of lords over their slaves was not absolute. If the owner beat out a slave’s eye or teeth, the slave recovered his liberty (d): if he killed him, he paid a fine to the king (e). These slaves were of two kinds, prædial and domestic.

We shall next take notice of the judicature of the Saxons, which depended, as we before said, on the division of land. In the thainland, the thain himself was the judge: so the judge of the reve-land was the *reve*, or *shire-reve*; whose great court was called the *reve-mote*, or *shire-mote*, and at other times the *folc-mote* (f). The limits between the official judicature of the king’s courts and the court belonging to the lord, were strictly preserved: only when the lord had no court, or refused to do justice; or when the contest was between a vassal of one and a vassal of another; then the suit was referred to the king’s court, namely, to the *reve-mote* of the sheriff.

Though the *sheriff*, *earl*, or *ealderman* (by all which names he was known) had properly the government of the county, a bishop was always associated with him in judicial matters. The *bishop* and *sheriff* used twice a-year to go a circuit, within a month after Easter, and a month after

(a) Spelm. Feuds, p. 14.

(b) Persons of this rank were called by the Saxons *Theow*, or *Theowmen*, as appears by LL. Will. Conq. 65, 66. and in LL. Hen. I. 77, 78. servi.

(c) Spelm. Feuds, p. 14.

(d) LL. Alf. sec. 20.

(e) Ibid. 17.

(f) Dalr. Feud. Prop. p. 11.

Michaelmas; and held the great court called *the tourn*, in every hundred in the county. This ^{The tourn.} was the grand criminal court, in which all offences both ecclesiastical and civil were tried. On the examination of the former, the bishop sat as judge, and the sheriff as coadjutor, to inflict temporal punishments: in the latter, the sheriff was judge, and the bishop his assistant, to aid his sentences, if necessary, by ecclesiastical censures.

The great court for civil business was the *county court*, held once every four weeks. Here the ^{County court.} sheriff presided; but the *suitors of the court*, as they were called, that is, the freemen or landholders of the county, were the judges; and the sheriff was to execute the judgment; assisted, if need were, by the bishop. Once a-year, at the Easter tourn or circuit, the sheriff and bishop were to hold also a *view of frank-pledge*; that is, to see that every person above twelve years of age had taken the oaths of allegiance, and found nine *freemen pledges* for his peaceable demeanour.

Out of the tourn were derived two inferior ^{Other inferior courts.} criminal courts, the *hundred* and the *leet*, for the expeditious and easy distribution of justice, where a hundred or manor lay too remote to be conveniently visited in the course of the tourn. The hundred court was held before some bailiff; the leet before the lord of the manor's steward. Both these, though held in the name of a subject, were the king's courts. Out of the county court was derived an inferior court of civil jurisdiction, called the *court baron*. This was held from three weeks to three weeks, and was in every respect like the county court; only the lord, to whom this franchise was granted, or his steward, presided, instead of the sheriff.

In all these courts, justice was administered near the homes of suitors with dispatch, and without much expence. Besides these, there was a superior court, known by the name of the *wittenagemote*, which had a concur- ^{The wittenagemote.} rent jurisdiction with them. This court sat in the king's palace, and used to remove with his person.

The judges, it is said, were the great officers of state, together with such lords as were about the court. The business of this court consisted in causes where the revenue was concerned; where any of the lords were charged with a crime; and in civil causes between them. This was the ordinary employment of the court: besides which, offences of a very heinous and public nature committed even by persons of inferior rank, were heard here originally; and all causes in the inferior courts might be adjourned hither, on account of their difficulty or importance.

Nature of landed property. The next object of consideration is the nature of property among the Saxons: and first, of landed property. It has been a question, long debated among the learned, whether the lands of the Saxons were subject to the terms of feudal tenure, or whether tenures with all their consequences were introduced by William the Conqueror. It would hardly afford much instruction or amusement at this time, to enter deeply into an enquiry which has been already so unsuccessfully discussed, and which has divided so many great names. Lord Coke (*a*), Selden (*b*), Nathaniel Bacon (*c*), sir Roger Owen (*d*), and

(*a*) 1. Inst. 776. (*b*) Titles of Honour, 510, 511. (*c*) Hist. Disc. 161.

(*d*) When I had entered upon this enquiry into the history of our law, I looked into the Harleian collection, if any thing could be there found on the subject; and there I discovered a manuscript of sir Roger Owen on "the antiquity and excellency of the common laws of England." I considered this as a valuable acquisition; and particularly so, when I soon afterwards found several writers had spoken of such a manuscript, which they had seen, and which they regretted had not been made public. I found it mentioned somewhere in Tyrrell's *Bibliotheca Politica*; in the collection of testimonies prefixed to Wingate's edition of Britton; and, lastly, in Mr. Barrington's Observations upon the more Ancient Statutes; who seems to speak of it as a work that had disappeared, and which was not known to be now extant. There are two copies of it: one of them is comprized in a folio volume, the other fills three folios; both of them, particularly the last, very fair and perfect.

I turned over these volumes, in hopes of deriving from thence some lights to assist me in my researches; but I was disappointed. The whole seemed to me to be written with a view to maintain the popular argument of those times, that our constitution and laws were derived, not from the Normans, but the Saxons; and that the Conqueror made no alteration therein. As this is the great aim of the work, it is confined to the very early period of our law, and consequently furnishes very few hints for an historical deduction that goes further down. I believe I have not had occasion to quote it more than once.

Tyrrell (*a*), are of opinion, that tenures were common among the Saxons. Crag (*b*), lord Hale (*c*), Somner (*d*), sir Henry Spelman (*e*), Dr. Brady, and sir Martin Wright (*f*), are of opinion, that feuds were first brought in and established by the Conqueror. After this difference of opinion, some later writers have taken a middle course. Blackstone (*g*), Dalrymple (*h*), and Sullivan (*i*), endeavour to compromise the dispute, by admitting an imperfect system of feuds to have subsisted before the Conquest.

Perhaps the latter of these opinions may be nearest the truth. A system of policy that had prevailed over all parts of Europe, it is most probable, got footing in England, inhabited by persons descended from the same common stock, and possessed of the country they then enjoyed under like circumstances with the nations on the continent. But the feudal law, in the time of our Saxon kings, was in no part of Europe brought to the perfection at which it afterwards arrived; and in this country, separated from the world, and receiving by slow degrees a participation of such improvements as were made in jurisprudence on the continent, we are not to look for a complete system of feudal law. At the latter part of this period, feuds on the continent were very little more than in their infant state; they were seldom granted longer than for the life of the grantee (*k*).

Without engaging in a controversy whose extent and difficulty have eluded the greatest learning and sagacity, it will be more satisfactory to notice such few facts as we really know respecting the landed property of the Saxons. We know that their lands were liable to the *trinoda neces-*

Sir Roger Owen had acquired the reputation of a great antiquarian; he was a particular friend of Whitelock; who quotes him in his Commentary on the Parliamentary Writ, vol. I. p. 208. See Barr. Obs. Stat. p. 116.

(*a*) Introd. vol. 2. p. 84. (*b*) Jus. Feud. lib. 1. tit. 7. (*c*) Hist. Com. Law. 107. (*d*) Gavel. 100. (*e*) Glos. Feudum. (*f*) Ten. 57. (*g*) Vol. ii. p. 48. (*h*) Feudal Prop. 7. (*i*) Lecture 28. (*k*) Lib. Feud. 1. tit. 1.

sitas; one of which was a *military service* on foot; another, *arcis constructio*; and another, *pontis constructio*. They were in general hereditary; and they were partible equally among all the sons. They were alienable at the pleasure of the owner; and were deviseable by will. They did not escheat for felony; and the landlord had a right to seize the best beast or armour of his dead tenant as a heriot. This is the principal outline of the terms on which landed property was possessed among the Saxons.

Method of conveyance. It should seem that a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Ingulphus says, *conferebantur prædia nudo verbo, absque scripto vel chartâ, tantum cum domini gladio, vel galeâ, vel cornu, vel cratere, et plurima tenementa cum strigili, cum arcu, et nonnulla cum sagittâ* (a). Thus Edward the Confessor granted to the monks of St. Edmund, in Suffolk, the manor of Brok *per cultellum* (b); and holding by the horn, by the sword, by the arrow, and the like, were common titles of tenure. However, deeds or charters were in use. These were called generally *gewrite*, i. e. writings; and the particular deed by which a free estate might be conveyed was usually called *landboc*, *libellus de terrâ*, a donation or grant of land (c). The land so passed was, as has been already observed, called *bocland*; and the person who so conveyed to another was said to *gebocian* him of it. An Anglo-Saxon charter of land has also been called *telligraphum* (d); the etymology of which mongrel term seems to imply that the land was therein described by its situation and bounds. But this appellation was probably adopted after the Conquest, as a translation of the word *landboc*. The like may be said of the term *cyrographum*, another name by which Anglo-Saxon charters were known: but those denoted by this name were of a peculiar kind; such as had

(a) Hist. Croy. 901. Franc. 1601.

(b) Mad. Form. Diss. pa. 1.

(c) Mad. Form. 283.

(d) From *tellus* and *γραφω*.

the word *cyrographum* written in capital letters either at the top or bottom of the charter, and cut through or divided by a knife (a).

Before the time of Edward the Confessor, the usage was to ratify charters by subsigning of names accompanied with holy crosses. This was done both by the parties and witnesses. It is generally believed, that Edward the Confessor was the first who brought into this kingdom the custom of affixing to charters a seal of wax. It is said, that being in Normandy, at the court of his cousin William, he there learned several Norman customs; and among others which he transplanted hither, was this of sealing deeds with wax. Though the word *sigillum* often occurs in charters before his time; yet some great antiquarians (among whom is sir Henry Spelman) have agreed, that this did not mean a seal of *wax*, but was used synonymously for *signum*, and denoted the sign of the cross and other symbols made use of in those times (b).

There is no evidence that the Saxons made any distinction between real and personal property: the whole property of a man was described by the general term, *res*; and under that denomination was subject to the same succession *ab intestato*, and might be given or disposed of by will.

We are not to imagine that the power of disposing by will was allowed without restriction; for we have every reason to conclude, from the prevailing custom of the realm in the next period, that they restrained a man from totally disinheriting his children, or leaving his widow without a provision. After such duties were reasonably performed, the remainder of his effects were at his own disposal. Consistently with such sentiments, we find the law, with regard to the estates of intestates, delivered in these words (c). *Sive quis incuriâ, sive morte repentini fuerit intestatus mortuus, dominus tamen nullam rerum*

(a) Mad. Form. Diss. 2. (b) Ibid. Diss. 27. (c) Leg. Can. c. 68.

suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito. Verùm possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure distribuantur.

There does not appear sufficient in the monuments of Saxon antiquity to make us assured in what manner they ordered the authentication of wills. It may, however, be conjectured, with some probability, that cyrographated or indented copies might be left with the alderman or sheriff of the county, or with the lord who had a court or franchise, where, besides the hearing of causes, other legal proceedings, spiritual as well as temporal, were usually transacted. It is more clear, that in this court was made the distribution of intestates' effects, according to the proportions above laid down. From this may be derived the privilege which the lords of some manors claim at this day, to have probate of wills in their manor-court, without the controul or interposition of the bishop.

All contracts for the buying or bartering of any thing were required to be made in the presence of witnesses. This was as much to prevent the sale of things stolen, or improperly obtained, as to preserve the memory of contracts and obligations. A law of king Etheldred ordained (a), that if there were no witnesses to a contract, the thing bargained for should be forfeited to the lord of the soil, till enquiry was made about the real ownership.

This regulation about contracts is frequently enforced in the Saxon laws; and the beneficial consequences of such strictness must have been universally felt. It had the effect of precluding questions and litigations about matters of contracts, and keeping the law of property in a very plain and intelligible state.

As the forms and circumstances under which property could become a subject of debate in their courts, were few and simple; so the proceedings must in a like degree have been uniform and unembarrassed. While the objects of

(a) Ca. 4.

legal enquiry admitted of little modification, and contained very little artificial learning, the freemen or landholders of the county were, no doubt, very competent judges of the matters they were to determine, and the parties themselves were equally qualified to be their own advocates. Causes were commenced by lodging a complaint; the admission of which by the officer of the court, and giving a day to the parties, constituted, perhaps, all the practical knowledge of the bar.

Before we speak of the criminal law of the Saxons, let us take a view of that remarkable institution so necessary towards a due execution of it; that is, the police established by Alfred.

It is said, that a hundred neighbouring families composed a *hundred*, as the name imports; ten such families constituted a *tything*, *decennary*, or *fribourg*; over which an officer presided, called *the head of the fribourg* (a). Every man in the kingdom was expected to belong to some decennary; and those who did not, were considered in the light of offenders, or at least of suspected persons, and were accordingly put in prison, till they could get some one to take them in, or become pledge for their good behaviour. In these decennaries, every man was a security for the rest; *pledging* himself that all and every of them should demean himself orderly, and stand to the enquiries and awards of justice. It was from such reciprocal engagement between the *free* members of a decennary, that this sort of community was commonly called *frank-pledge*. If any one fled from justice, the term of thirty-one days was given to the decennary to produce the offender. If he did not then appear, the head of the fribourg was to take two principal persons of his own decennary, and from the three neighbouring decennaries, the head and two of their members: these, together with himself, making twelve, were to purge him and his decennary from any wilfulness or privity to the offender's

(a) Leg. St. Edw. 20.

crime or flight: and if the head of the fribourg could not purge his decennary in this way, he and his decennary were, of themselves, to make a compensation to the party injured.

So great care was taken that persons should be well known before they were harboured, that if any one took a stranger in, and suffered him to stay three nights under his roof, and the stranger afterwards committed any crime; the person so harbouring was considered as having made himself a *pledge* for him, as for one of his own family; and was, upon the absconding of the offender, to make amends to the injured person (*a*).

An establishment like this contributed more effectually than any other to the prevention of crimes, as well as to the detection of offenders.

We shall now take a cursory view of the Criminal law. penal code of this people. The Saxons were particularly curious in fixing pecuniary compensations for injuries of all kinds, without leaving it to the discretion of the judge to proportion the amends to the degree of injury suffered. These penalties were more or less, according to the time or place in which the wrong was committed, or the part of the body or member which was injured (*b*). The cutting off an ear was punished with the penalty of thirty shillings; if the hearing was lost, sixty shillings: so, striking out the front tooth was punished with a fine of eight shillings; the canine tooth, four shillings; the grinders, sixteen shillings (*c*): if a common person was bound with chains, the amends were ten shillings; if beaten, twenty shillings; if *hung up*, thirty shillings (*d*).

In the same manner injuries to property were generally considered in a criminal light; and the specific amends to be made by the wrong doer to the injured party were

(*a*) Leg. St. Edw. 27. (*b*) Leg. Inæ, 6. Leg. Alf. 23. (*c*) Leg. Alf. 40.

(*d*) Leg. Alf. 31.

fixed by law. A man who mutilated an ox's horn was to pay ten-pence; if that of a cow, then only two-pence: a like distinction was made between cutting off the tail of an ox or a cow (*a*). To fight or make a brawl in the court or yard of a common person, was punished with a fine of six shillings; to draw a sword in the same place, even though there was no fighting, with a fine of three shillings: if the party in whose yard this happened was worth six hundred shillings, the amends were treble; and they were increased further, according to the circumstances of the person whose house and domain were so violated (*b*).

A system of regulations framed on this principle seems to have converted all notions of civil redress for injuries into a criminal inquiry; while the degree and circumstances attending the fact, both which it was out of the power of legislation exactly to reach, made no part of the judicial consideration; but the judge was to award the same stated fine, in all cases which could be brought within the letter of the legal description. However, these penalties had so far the nature of a civil redress, that they were given in the way of compensation to the injured person.

The notion of compensation runs through the whole criminal law of the Anglo-Saxons; who allowed a sum of money as a recompence for every kind of crime, not excepting the taking away the life of a man. Every man's life had its value, called a *were*, or *capitis estimatio*. This had been various at different periods (*c*); in the time, therefore, of king Athelstan, a law was made to settle the *were*, of every order of persons in the state. The king, who, on this occasion was only distinguished as a superior personage, was rated at 30,000 thrymsæ (*d*); an archbishop or earl, at 15,000; a bishop or ealderman, at 8,000; *belli imperator*, or *summus præfec-*

Were.

(*a*) Leg. Inæ, 59.

(*b*) Leg. Alf. 35.

(*c*) Leg. Inæ, 69.

(*d*) A *thrymsa*, according to Du Fresne, was worth four-pence.

tus, at 4,000; a priest or thane, at 2,000; a common person, at 267 *thrymsæ*. It seems this *were* was sometimes different in different parts of the country (*a*). When any person was killed, the slayer was to make compensation to the relations of the deceased, according to such valuation. In the case of the king, half the *were* went to his relations, and half to his people. If the deceased was a stranger, or had no relations, the *were* was to be divided; half to go to the king, and half to the most intimate companion of the deceased (*b*).

As the manners and notions of this people would not allow them to submit to any harsher punishment in the first instance, it was endeavoured to render this as severe as possible. The *were* was not to be remitted (*c*); and to make the offender an example, as well as to prevent the effusion of blood, all his own relations were, by a law of king Edmund (*d*), discharged from the obligation of abetting him against the *feud* of the relations of the deceased; whose deadly resentment he was to support *alone*, till he had paid the *were*. A person guilty of homicide was also excluded from the presence of the king.

But this *were*, in cases of homicide, and the fines that were paid in cases of theft of various kinds, were only to redeem the offender from the proper punishment of the law, which was death; and that was redeemable, not only by paying money, but by undergoing some personal pains: hence it is that we hear of a great variety of corporal punishments. A person *often* charged with theft, was to lose his hand or foot (*e*). There was also the pain of banishment and slavery (*f*); and at one time it was enacted (*g*), that house-breaking, burning of houses, open robbery, manifest homicide, and treason against one's lord, should

(*a*) Leg. Athelst. 3. (*b*) Leg. Inæ, 22. (*c*) Leg. Edm. 3.
 (*d*) Ca. 3. (*e*) Leg. Inæ, 18. (*f*) Leg. Can. 6. (*g*) Leg. Can. 61.

be *inexpiable* crimes; that is, not to be redeemed by any pecuniary compensation, or any pain or mutilation.

Thus far of punishments. We come now to consider the notions they had of crimes, and their nature. A person present at the death of a man was looked on as *particeps criminis*, and as such was liable to a fine (a). A person killing a thief, unless he purged himself by oath before the relations of the deceased, relating all the circumstances of the fact, and that immediately, was to pay a fine (b). If one in hewing a tree happened to kill a man, the relations were intitled to the tree, provided they took it within thirty days (c); which was in the nature, and might perhaps be the origin, of *deodands*. It does not appear that they made any distinction in the degrees of homicide; except in one instance, which deserves particular notice; and

that is, where the fine called *murdram* was to Murder.
be paid. It is said, that Canute, being about to leave the kingdom, and afraid that the English might take advantage of his absence to oppress or destroy his own subjects, the Danes, procured the following law in order to prevent secret homicides: That when any person was killed, and the slayer had escaped, the person killed should be always considered as a Dane, unless proved to be English by his friends or relations; and in default of such proof, that the vill should pay forty marks for the Dane's death; and, if it could not be raised in the vill, that the hundred should pay it. This singular provision, it was thought, would engage every one in the prevention or prosecution of such secret offences (d). It was upon this sort of policy that presentments of *Englshery*, as they were afterwards called, were founded.

Larceny, called by the Saxons *stale*, might Larceny.
have been committed by a child of ten years old (e); but afterwards this crime was not imputed, unless

(a) Leg. Inæ, 33. Leg. Alf. 26.

(b) Leg. Inæ, 34.

(c) Leg.

Alf. 13. (d) Leg. Confess. 15, 16.

(e) Leg. Inæ, 7.

the child was twelve years of age (*a*). If all the family of the offender were privy to the stealing, they were all to be made slaves (*b*). Where there was not that privy in a family, the mulct was, at one time, sixty shillings; at another time, one hundred and twenty shillings (*c*). Such regard was paid to the character of a wife, and the subjection she was supposed to be under to her husband, that when any thing stolen was found in their house, the law considered her as no party in the stealing, unless it were manifestly in her separate custody (*d*).

The more atrocious of these offenders, when they came in a body of seven, were called *theof*, or *prædones*; if more than seven, they constituted *hlothe*, or *turma*; if more than thirty-five, they were then called *herge*, or *exercitus* (*e*). These distinctions shew in what manner these people carried on their depredations, in the times before Alfred reformed the police.

False swearing was, at first, only punishable by a fine of one hundred and twenty shillings (*f*). Afterwards (*g*), false swearers were considered as no longer intitled to credit, and were obliged to purge themselves, not by their own affirmation on oath, but by the ordeal: they were sometimes excommunicated.

Breaches of the peace were severely punished, as leading usually to bloodshed and death. If a person fought in the king's palace, his life was in the king's hands, unless he redeemed it with a fine (*h*); and particular penalties were inflicted on those who fought in the presence of the bishop and ealderman (*i*); or in the city or town where the bishop and ealderman were then holding their court (*k*). A law of king Edmund's was so severe (*l*), that if any one attacked another in his house, or broke the peace there, he was to forfeit every thing, and his life was to be at the king's dis-

(*a*) Leg. Athelst. 1. (*b*) Leg. Inæ, 7. (*c*) Leg. Athelst. 1.
 (*d*) Leg. Inæ, 58. Leg. Can. 74. (*e*) Leg. Inæ, 13, 14, 15. (*f*) Leg.
 Inæ, 12. (*g*) Leg. Edw. 3. (*h*) Leg. Alf. 7. (*i*) Ibid. 15, 34.
 (*k*) Ibid. 36. (*l*) Leg. Edm.

posals. The great occasion of violent breaches of the peace, were the *deadly feuds* by which people in those ^{Deadly feuds.} times revenged the death of a relation. This method of prosecuting offenders had become so habitual to the people, that it appeared necessary even to make it a part of the penal code; and it was accordingly inserted under reasonable restrictions in a law of Alfred (a). At length, it was thought expedient to impose additional checks on this singular piece of criminal jurisprudence. This was done by a law of Edmund (b); which directs, that somebody, in the nature of an arbiter, should be deputed to the relations of the deceased, and engage that the slayer should make compensation. He, in the mean time, was to be put into the hands of this arbiter, who was to see that sufficient sureties were taken for paying the *were* in twenty-one days; during which time there was to be peace, by mutual compact.

Very early after the Saxons had been converted to Christianity, places of public worship ^{Sanctuary.} were held in such reverence, that a criminal flying thither was, during his stay there, allowed protection, whatever his crime might be (c). It was usual to fly to such a place of security, to avoid the instant resentment of the aggrieved party, till provision could be made for paying the legal compensation. In a state of society like that among the Anglo-Saxons, the immunity indulged to places of worship was politic, humane, and necessary. It prevented the shedding of blood, and preserved the peace. Accordingly a penalty was inflicted on those who dared to violate this place of sanctuary, by evil treating the culprit while there (d); the *pax ecclesiæ* being more sacred, and in this instance better protected by law, than the *pax regis*. The offender might stay there thirty days, and was then to be delivered to his relations unhurt and safe (e). Notwithstanding

(a) Leg. Alf. 38. (b) Leg. Edm. 7. (c) Leg. Inæ, 5. (d) Leg. Alf. 2. (e) Ibid. 5.

ing this regard for churches, there seems to have been no immunity granted to the persons of churchmen. If a clerk committed homicide, he was to be degraded from his orders, and was, moreover, to make his compensation, or suffer punishment, in the same manner as any other person (a).

The bringing of criminals to justice was very much facilitated by the police established in the reign of Alfred. The objects which next present themselves, are the proceeding, the mode of trial, and the proof; all which were very remarkable parts of the Anglo-Saxon jurisprudence. The prosecutor, or accuser, as he was called, made his charge; which, it should seem, was sufficient alone to put the person accused on his defence. The defence and answer to this charge was this: If it was a matter not of great notoriety, but such as might admit of some doubt, the party *purged* himself by his oath, and the oaths of certain persons (called thence *compurgators*) vouching for his credit, and declaring the belief they had that he spoke truth. If the compurgators agreed in a favourable declaration, this was held a complete acquittal from the accusation. But if the party had been before accused of larceny or perjury; or had any otherwise been rendered infamous, and was thought not worthy of credit, he was driven to make out his innocence by an appeal to heaven, in the trial by *ordeal*. This was of several kinds. The two principal were by water and iron; by water hot or cold, and by hot iron: the iron was to be of one, two, or three pounds weight; and was, therefore, called simple, double, or triple ordeal.

The *ordeal* was considered as a religious ceremony. The person, the water, and the iron were accordingly prepared under the direction of the priest, by exorcisms and other formalities, and the whole conducted with great solemnity. For three days before the trial, the culprit was (b) to attend the priest, to be constant at mass, to make his offering, and in the mean time to sustain himself on nothing but bread,

(a) Leg. Can. 36. 33. (b) Leg. Athelst. 23.

salt, water, and onions. On the day of trial, he was to take the sacrament, and swear that he was not guilty of, or privy to, the crime imputed to him. The accuser and accused were to come to the place of trial, attended with not more than twelve persons each, probably to prevent any violence or interposition; and a production of more than that number by the accused would have amounted to a conviction. The accuser was then to renew his charge upon oath, and the accused to proceed in making his purgation. If it was by hot water, he was to put his hand into it, or his whole arm, according to the degree of the offence: if it was by cold water, his thumbs were tied to his toes, and in this posture he was thrown into it. If he escaped unhurt by the boiling water, which might easily be contrived by the management of the priests, or if he sunk in the cold water, which would certainly happen, he was declared innocent. If he was hurt by the boiling water, or swum in the cold, he was considered as guilty (a).

If the trial was to be by the hot iron, his hand was first sprinkled with holy water; then taking the iron in his hand, he walked nine feet. The method of taking his steps was particularly and curiously appointed. At the end of the stated distance he threw down the iron, and hastened to the altar; then his hand was bound up for three days, at the end of which time it was to be opened; and from the appearance of any hurt, or not, he was declared in the former case, guilty, and in the latter, acquitted. Another method of applying this trial by hot iron, was by placing red-hot plough-shares at certain distances, and requiring the delinquent to walk over them; which if he performed unhurt, was considered as a proof of his innocence. These trials by water and fire were called *judicia Dei*.

Another method of trial was by the *offa execrata*, or Corsned; which was that by which the clergy were used to

(a) Leg. Athelst. 23.

purge themselves, and which they chose, probably, as the least likely to put the party to any peril. A morsel of bread was placed on the altar with great ceremony and preparation, which the person to be tried was to eat: if it stuck in his throat, this was to be considered as a token of his guilt. Thus, in this instance and that of the cold water, a miracle was supposed to be wrought, to prove the guilt of the person; in those of the hot water and hot iron, the like divine interposition was expected to demonstrate his innocence. Another ordeal was, that of *the cross*. This was performed by placing two sticks, one with a cross carved upon it, and one without; and making the culprit chuse one of them blindfolded. If he hit upon that which had the cross upon it, this piece of good fortune was looked upon as an evidence of his innocence. These seem to have been the methods of investigating truth in criminal inquiries.

It may be observed, that the Anglo-Saxons made a distinction between manifest or open offences, and such as were not so public; and the degree of punishment was proportioned accordingly. It has been observed, that this implied some doubt entertained by themselves of their methods of proof (*a*); but it may be remembered, that the Romans made the like distinction, and inflicted only half the punishment on *furtum non manifestum*, which they did on that which was *manifestum*.

Trial in civil suits. Next as to civil causes, and the manner in which they were tried. It seems, that causes in the county and other courts were heard and determined by an indefinite number of persons called *sectatores*, or suitors of court; and there is no great reason to believe that they had any juries of twelve men, which was an invention of a much later date. These *sectatores* used to give their judgment or verdict both upon the matter of fact and of law. It may be a doubt, whether they ever acted as an inquest to make inquiry of crimes and delinquents, as juries

(a) Littl. Hen. II. vol. 5. 292.

did after the Conquest. In a law of king Ethelred (*a*), there is a provision that there should be twelve *thanes*, or *liberi homines* of superior consideration and parts, whose concurrence was made necessary. It should seem, however, these were rather assessors to the judge of the court, than a part of the suitors, or indeed any thing like a jury (*b*). By all the monuments that remain of these times, it appears, that the number of *sectatores* was various, according to the custom of different places; and perhaps in most instances depended on chance and convenience; but in no case is there the least reason to believe that it was confined to twelve (*c*). These *sectatores* discharged their office, it is thought, without any other obligation for a true performance of it, than their honour; for it does not appear that they were *sworn* to make a declaration of the truth (*d*). It is not improbable, that the *thanes* in the counties, the citizens in boroughs, and those who were the *sectatores* in other courts, might determine all causes, in like manner as peers of the realm, at this day, determine in criminal cases, without an oath. There is at least a perfect silence as to this subject in the remains of antiquity; and the most we can conjecture is, that they might perhaps solemnly engage to speak the truth in all matters which should come before them, without renewing it in every particular cause (*e*).

It is not unsuitable with what has been already said of the modes of proof used by these people, to suppose that they admitted the oath of the defendant in civil causes, when that oath was supported by *compurgators*, who swore they believed what he said to be true. The laws requiring witnesses to all contracts, supplied evidence almost in all inquiries about them; but where that was not the case, it seemed consistent enough with the established order of living in those times to allow credit to a man's oath, *when*

(*a*) Leg. Ethel. ca. 4. (*b*) Hickes' Thes. Diss. Ep. 34. (*c*) Ibid. 33.

(*d*) Ibid. 42. (*e*) Ibid. 42.

supported by the concurring testimony of others to his credit. The small districts into which the people were divided, and the consequent relation which by law they bore to each other, furnished abundant opportunities for a man's character to be known; and declarations of his neighbours concerning his credibility might be received with no small degree of confidence.

It cannot be dissembled that some learned men have been of opinion, that the trial by jury was in use among the Saxons; and this point, like some others, has been maintained with great pertinaciousness by those who have laboured to prove the antiquity of our juridical constitution.

This opinion may, probably, have been founded on the similitude between *sectatores* and *jurors*; an appearance which, on a superficial view, may indeed deceive. However, it may be laid down with safety, that the trial by jury did not at this time exist; and if the reader will suspend his judgment till he comes to those times when the trial by jury was really established, he will then see distinctly the essential difference between *sectatores*, *compurgatores*, and *juratores*; and will agree with us in declaring, that the frequent mention of *sectatores* is no proof of *juries*, properly so called, being known to our Saxon ancestors.

Thus have we attempted to give a sketch of that system of jurisprudence which subsisted among the Saxons. The materials which furnish any knowledge of it are so few and scanty, that it is with the utmost difficulty any thing consistent can be collected from them. This must give rise to a variety of opinions, according as persons are biassed by prejudices and different turns of thinking. Perhaps, after all, the clearest opinion that can be formed respecting such distant and obscure times, is not worth defending with much obstinacy.

Of this the reader will be able to judge, when, in the course of this History, he finds institutions either so abundantly superinduced upon the original ground-work, or so

entirely substituted in the place of it, that very little remains of the Saxon jurisprudence can be traced, even in the earliest times of our known law, after the Conquest. The parts which alone survived that revolution, seem to have been the methods of trial, some notions of criminal law, and the scheme of police. The others were gradually superseded, and at length are no longer known.

It remains now to inquire what steps were taken by the Anglo-Saxons in collecting and improving their laws, and what monuments they left of their legal polity.

We are told, that the great and good king Alfred, besides the regulations he made for the better order and government of his people, seeing how various the local customs of the kingdom were, made a collection of them; and out of them composed his *Dom Boc*, or *Liber* Alfred's Dom Boc. *Judicialis*. It seems this was intended as a code for the government of his whole kingdom; and it obtained, with great authority, during several reigns; being referred to, in a law made by king Athelstan, as an *authoritative* guide (a).

However, this work, valuable as it was, had probably the defects of all original attempts. On that account, as well as on account of the irruption and settlement of the Danes, and the consequent prevalence of their customs, it was found necessary in the days of king Edgar to revise this compilation, or make another more full, and Compilation by Edward the Confessor. more suitable to the then state of the law. But this undertaking was left unfinished; so that the grand design of making a complete code of English law fell to the part of Edward the Confessor; who is said (b) to have collected from the Mercian, West Saxon, and Danish law, an uniform body of law to be observed throughout the kingdom (c). From this circumstance,

(a) Ca. 5. (b) Hoveden, Hen. II. Leg. St. Edw. 35 to 36. Lamb. p. 149.

(c) 1. Bla. 66.

the character of an eminent legislator has been conferred on Edward the Confessor by posterity; who have endowed him with a sort of praise nearly allied to that of Alfred: for as one is dignified with the title of *legum Anglicanarum Conditor*, the other has been called *legum Anglicanarum Restitutor*.

It is said, that the *Dom Boc* of Alfred was in being about the time of Edward IV.; but we hear nothing of the fate attending the volume compiled by Edward the Confessor. As to the nature of the work; it seems probable, that as the Danes had now become incorporated into the body of the people, their laws were melted down into one mass with the Mercian and West Saxon; and all together composed a set of laws to govern both people. This, most likely, was done with equable qualifications of all these laws, so as to render submission to them, by both nations, neither strange nor oppressive. It should seem, there was throughout that book a constant intimation what was Saxon, Mercian, or Danish; as we find in the laws of William the Conqueror, which were designed to make certain alterations in those of Edward, frequent mention of them by their respective names, as different subsisting laws.

As the collection of Edward the Confessor comprised in it the whole law of the kingdom, it contained not only the unwritten customs, but the laws and statutes made by the several kings. By the loss of this volume, we are left very much in ignorance as to the extent, scope, and nature of these customs. It is not so with the written laws of these times; for we have many of these still remaining. These remains of Saxon legislation give us some insight into the nature of their jurisprudence.

As laws, if not made to create some new regulation, are designed to restrict, amend, or enlarge some pre-existent custom, or law; they always enable us to make some conjectures respecting the subject upon which they are intended to operate. From these Saxon laws we may pronounce, that

matters of judicial inquiry were treated with great plainness and simplicity. Like the laws of a rude people, they are principally employed about the ordering of the police; and accordingly contain an enumeration of crimes and their punishments. As this makes the greater part of the Saxon laws now existing, it may fairly be concluded that the *Dom Boc* of Alfred and the compilation of Edward the Confessor were mostly filled with the same kind of matter.

The first of the Saxon laws, now in being, Saxon Laws. are those of king Ethelbert. These are the most ancient laws in our realm, and are said to be the most ancient in modern Europe. This king reigned from 561 to 636. The next are the laws of Hlothaire and Eadric, and of Wihtred, all kings of Kent. Next are those of Ina, king of the West Saxons. After the Hephtharchy we have the laws of Alfred, Edward the Elder, Athelstan, Edmund, Edgar, Ethelred, and Canute. Besides these, there are canons and constitutions, decrees of councils, and other acts of a public nature. These are in the Saxon language, and were some of them collected in one volume in folio, by Mr. Lambard, in the time of queen Elizabeth, and published under the title of *Ἀρχαιονομία; sive, de priscis Anglorum legibus*. To this additions have since been made by Dr. Wilkins. These remains compose, all together, a body of Anglo-Saxon laws for civil and ecclesiastical government.

We have refrained from mentioning some laws which have gone under the name of Edward the Confessor, as they have been rejected for spurious (a), upon the fullest consideration of antiquarians. They are in Latin, and bear evident internal marks of a later period. They are supposed to have been written, or collected, about the end of the reign of William Rufus; and are to be found in the collections of Lambard and Wilkins.

(a) Spelman voce Ballivus.

CHAP. II.

WILLIAM THE CONQUEROR TO JOHN.

The Conquest—Saxon Laws confirmed—The Laws of William the Conqueror—Trial by Duel in Criminal Questions—Establishment of Tenures—Nature of Tenures—Different Kinds of Tenures—Villenage—Of Escuage—Consequences of Tenure—Of Primogeniture—Of Alienation—Of Judicature—The Curia Regis—Justices Itinerant—The Bench—The Chancery—Judicature of the Council—Of the Spiritual Court—Of the Civil and Canon Law—Doctrines of the Canon Law—Probate of Wills—Constitutions of Clarendon—Of Trial by Duel in Civil Questions—Of Trial by Jury—by the Assize—Of Deeds—A Feoffment—A Fine—Of Writs—Of Records.

THE accession of William of Normandy to the English throne makes a memorable epoch in the history of our municipal law. Some Saxon customs may be traced by the observing antiquary, even in our present body of law; but in the establishment made in this country by the Normans, are to be seen, as in their infancy, the very form and features of the English law. It is to the conquest and to the consequences of that revolution that the juridical historian is to direct his particular attention. A new order of things then commenced. The nature of landed property was entirely changed; the rules by which personal property was directed, were modified; a new system of judicature was erected; new modes of redress conceived; new forms of proceeding were devised; the rank and condition of individuals became entirely new; the whole constitution was altered; and, after fluctuating on a singular policy, pregnant with the most opposite consequences of freedom and slavery, by degrees settled into peace and orderly go-

vernment. In short, a state of things then took place, from which, after innumerable alterations, arose the present frame of English jurisprudence.

It has long been a debated question, in what manner William was the *conqueror* of this island; nor has the discussion been confined to historians and antiquaries: the adherents of modern parties did, at one time, warmly interest themselves in the decision of a point, which they considered as involving consequences very material to the political opinions they avowed. The lovers of high monarchical authority thought they derived a very ancient and rightful title to all kinds of prerogative in the king, by maintaining that William made the people of this country submit, as a conquered nation, to his absolute will. ^{The Conquest.} The friends of liberty, admitting, as it should seem, in some measure, the consequences of such a claim, contended as firmly that William never assumed such powers, and was in truth no conqueror. Attempts have been made to explain the term *conquest* in such a manner as to get rid of any unfavourable conclusions from the word. It is said to have been a conquest over Harold, and not over the kingdom; that conquest signifies *acquest*, or new acquired feudal rights (a); with other explications of the like design and import; so important a matter was it esteemed to ascertain the true nature of this event in our history; as if the tyranny of a prince who lived seven hundred years ago, could be a precedent for the oppressions of his successors; or any length of time could establish a prescription against the unalienable rights of mankind. The present prevailing notions of free government are founded on better grounds than the examples of former ages, when our constitution was agitated by many irregular and violent movements: they are founded on a rational consideration of

(a) In the law of Scotland, at this day, *feuda nova*, or, as we call it, lands taken by purchase, are termed *feus of CONQUEST*. Ersk. Prin. b. 3. tit. 8. sect. 6.

the ends of all government, the good of the whole community. To leave such useless disquisitions, let it suffice to relate the fact; that William put off the character of an invader as soon as he conveniently could; and took all measures to quiet the kingdom in the enjoyment of its own laws, and a due administration of justice.

Saxon laws confirmed. We are told, that in the fourth year of his reign, at Berkhamstead, in the presence of Lanfranc archbishop of Canterbury, he solemnly swore that he would observe the good and approved ancient laws of the kingdom, particularly those of Edward the Confessor; and he ordered, that twelve Saxons in each county should make inquiry, and certify what those laws were.

When the result of this inquiry was laid before William, and he had set himself to consider the different laws of the kingdom more particularly; he shewed a disposition to give a preference to the Danish, as more conformable with those of Normandy; being sprung from the same root, and better suited to the genius of his own subjects. This alarmed the English, who wished to have no more of that law imposed, than what had been incorporated into their customs by Edward the Confessor. They beseeched him not to recede from his solemn engagement; and conjured him by the soul of Edward, who had bequeathed him his present sovereignty, to confirm the English in possession of their laws as they stood at the death of the Confessor. To this William at length consented, and, in a general council (*a*), solemnly ordained, that the laws of Edward, with such alterations and additions as he himself had made to them, should in all things be observed.

In this manner was the system of Saxon jurisprudence confirmed as the law of the country; and from thenceforth it continued the basis of the common law, upon which every subsequent alteration was to operate.

(*a*) Leg. Conq. 63.

Though these alterations soon grew very considerable; yet the direct and open change by positive laws was not great. The laws of William are in *pari materiâ* with those that remain of the Saxon kings; except such as introduced the feudal constitution, and the trial by duel. But a revolution was effected through other means, and that by slow and imperceptible degrees. The Normans brought over with them a disposition to favour the institutions to which they had been used in their own country; and the comparative state of the two people enabled them to succeed in the attempt. Having, from their continental situation, had greater opportunities of improving their polity and manners, they had very far surpassed the Saxons in knowledge and refinement. This was discoverable in their laws; which were conceived and explained with some degree of artificial reasoning. Though this jurisprudence was simple, compared with what it grew to in after-times, it was conceived on principles susceptible of the inferences and consequences afterwards really deduced from it.

The doctrine of tenures being once established by an express law, all the foreign learning concerning them of course followed. The other parts also of the Norman jurisprudence, their rules of property and methods of proceeding, soon began to prevail: they were referred to and debated upon as the native custom of this realm, or very fit to be ingrafted into it; and being once introduced and discussed in the king's courts, which were framed upon the Norman plan, and presided over by Norman lawyers, they gradually became a part of the common law of England.

The revolution effected by these means was very important indeed. Besides tenures, with all their incidents and properties, the *aula*, or *curia regis* was established; as was the law of estates, the use of sealed charters, the trial by a jury of twelve men, and the separate jurisdiction of the ecclesiastical judge. These were almost instant con-

sequences of the Conquest. The other branches of the Norman law soon followed upon the like tacit admission, that they constituted a part of the common law of the realm.

The laws of William the Conqueror. We shall now consider those laws which were made by William the Conqueror, and have constantly gone under his name. The regulations made by these laws seem, most of them, very little worthy of curiosity, as differing in nothing from the subject of many Saxon constitutions. They make some alterations in the value of *weregilds* and penalties. They sometimes merely enforce or re-enact what was before the law of the realm; taking notice of the differences observed by the three great governing polities, the West-Saxon, Danish, and Mercian. The parts of these laws which are most material are the following.

The *relief*, or consideration to be paid to the superior upon succeeding to the inheritance, was settled in the case of an earl, baron, and vavasor; the first at eight horses, the second at four, and the last at one; these were to be caparisoned with coats of mail, helmets, shields, and other warlike accoutrements (*a*). The relief of those who held by a certain rent, was to be one year's rent (*b*); and that of a slave, or, as he was now called, a *villain*, was to be his best beast (*c*). It was directed, that if a man died intestate, his children should divide the inheritance equally (*d*). It was strictly enjoined, that no one omit paying the due services to his lord, on pretence of any former indulgence (*e*). A regulation was made respecting *namium*, or, as it has since been called, a *distress*; a kind of remedy which, according to some, was introduced by the Normans, and according to others was before in use here. It was directed (*f*), that a *namium* should not be taken till right had been demanded three times

(*a*) 229 Conq. 22, 23, 24. (*b*) 40. (*c*) 29. (*d*) 38. (*e*) 34, (*f*) 42.

in the county or hundred court; and if the party did not appear on the fourth day appointed, that the complainant should have leave of court to take a *namium* or distress sufficient to make him full amends. Thus this summary remedy was considered only in the light of a compulsory process, and was therefore called *districtio* (and thence in after-times *distress*), from *distringere*, which, in the barbarous latinity of those days, signified *to compel*. The remarkable law made by Canute in protection of his Danes was adopted by William, in favour of his own subjects. He ordained (a) that where a Frenchman (b) was killed, and the people of the hundred had not apprehended the slayer and brought him to justice within eight days, they should pay forty-seven marks, which fine was called *murdrum*. By virtue of this, presentments of *Englishery* were made; and all the former law upon the subject was continued, with the single difference of putting *Frenchman* in the place of *Dane*. William forbad all punishments by hanging, or any other kind of death (c); and substituted in the place of it several kinds of mutilation; as the putting out of eyes, cutting off the hands or feet, and castration. This alteration was made, says the law, that the trunk may remain a living mark of the offender's wickedness and treachery.

There are some laws of William which establish the trial by *duel*, and sketch out certain rules for the application of it (d). By one law, the same liberty is given to an Englishman, which every Frenchman had in his own country, to accuse or appeal a Frenchman, by duel, of theft, homicide, or any other crime, which before that time used to be tried either by the ordeal or duel. If an Englishman declined the duel, then the Frenchman was at liberty to purge himself by the oaths of witnesses, according to the law of Normandy. On the other hand, if a Frenchman (e)

(a) 26. (b) *Francigena*. (c) 229. *Conq.* 67. (d) 68. (e) 69.

appealed an Englishman by duel, the Englishman was to be allowed his election, either to defend himself by duel or by ordeal, or even by witnesses; and if either of them were infirm, and could not or would not maintain the combat himself, he might appoint a champion. If a Frenchman (*a*) was vanquished, he was to pay to the king sixty shillings. In cases of outlawry (*b*), the king ordained, that an Englishman should purge himself by *ordeal*; but that a Frenchman appealed by an Englishman in such a case, should make out his innocence by duel. However, if the Englishman should *be afraid* (*c*), says the law, to stand the trial by duel, the Frenchman shall purge himself *pleno juramento*, that is, by oaths of compurgators.

Thus was the trial by duel formally established in criminal inquiries; but with such qualifications annexed, as shew a regard to the prejudices which both people had in favour of their own customs. The trial by duel in civil causes does not appear to have been introduced by any particular law; but, when this opening was made, it soon began generally to prevail; and indeed, after such a precedent, it had more colour of legal authority than the numerous other innovations derived from that nation.

Establishment It was declared by a law of William (*d*), of tenures. that all free men should enjoy their lands and possessions free from *unjust exactions and talliages*; so that nothing be taken from them but what was due by reason of services, to which they were bound. What those services were, we are now going to consider.

The most remarkable of William's laws are cap. 52. and 58. The tenor of the 52d is this: *Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quòd intra et extra universum regnum Angliæ (quod olim vocabatur regnum Britannia), Wilhelmo suo domino fideles esse velint; terras et honores illius fidelitate ubique ser-*

(*a*) 70. In these and the other passages the word is *Francigena*.

(*b*) *De omnibus rebus utlagariæ*, 71. (*c*) *Non audeat*. (*d*) 55.

vare cum eo, et contra inimicos, et alienigenas defendere. The interpretation put upon this law is, that all owners of land are thereby required to engage and swear, that they become vassals or tenants, and as such will be faithful to William, as lord, in respect of the *dominium* (upon the feudal notion) residing in a feudal lord (*a*); that they would swear, every where faithfully to maintain and defend their lord's territories and title as well as his person; and give him all possible assistance against his enemies, whether foreign or domestic (*b*). These engagements and obligations being the fundamental principles of the feudal state, it was said, that when such were required from every freeman to the king, that polity was in effect established.

As the enacting language of this law is in the first person plural, *statuimus*, and the king is spoken of in the third person, some writers think it must be considered as an act of the legislature. A regulation that was at once to overturn the whole law of the kingdom with regard to land, could not well be hazarded on any other authority; and indeed chap. 58. of these laws, which dilates more largely upon the subject of this, refers to it as ordained *per commune concilium*.

The terms of this law are very general; and probably it was purposely so conceived, in order to conceal the consequences that were intended to be founded thereon. The people of the country received with content a law which they looked upon in no other light than as compelling them to swear allegiance to William. The nation in general, by complying with it, probably meant no more than the terms apparently imported, namely, that they obliged themselves to submit, and be faithful to William, as their lord, or king, to maintain his title and defend his territory (*c*). But the persons who penned that law, and William who promoted it, had deeper views, which were a little more explained in his 58th law. This constitution runs in these words: *Sta-*

(*a*) Wright Ten. 68.

(*b*) Ibid. 68.

(*c*) Ibid. 79.

tuimus etiam, et firmiter præcipimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti habeant et teneant se semper bene in armis et in equis, ut decet, et oportet; et quòd sint semper prompti, et bene parati ad servilium suum integrum nobis explendum, et peragendum, cùm semper opus fuerit, secundum quod nobis DE FEODIS debent et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti, et illis dedimus et concessimus in fædo, jure hæreditario.

By this law the nature of the service to be performed is expressly mentioned, namely, knight-service on horseback; and the term of each feudal grant was declared to be *jure hæreditario*. This latter circumstance must have had a very considerable effect in quieting the minds of men, respecting the nature of this new establishment. The Saxon feuds, being perhaps beneficiary, and only for life, were at once converted into inheritances; and the Normans obtained a more permanent interest in their new property, than probably they had before enjoyed in their ancient feuds.

From these two statutes were deduced the consequences of tenure: from these a new system of law sprung up, by which the landed property of the kingdom was entirely governed till the middle of the last century, and is, in some degree, influenced even at this day. The Norman lawyers, who were versed in this kind of learning, exercised their talents in explaining its doctrines, its rules, and its maxims; and at length established, upon artificial reasoning, most of the refinements of feudal jurisprudence.

By the operation of these two statutes, the Saxon distinction between Bocland and Folcland, charter-land and allodial, with the *trinoda necessitas*, and other incidents, was totally abolished; and all the *liberi homines* of the kingdom, on a sudden, became possessed of their land under a tenure which bound them, in a feudal light, mediately or immediately to the king. Thus, if *A.* had received his land o

the king, and *B.* had received his of *A.*; *B.* now held his land of *A.* on the same terms, and under the same obligations, that *A.* held his of the king; each considering himself under the reciprocal obligation of lord and tenant. In this manner it became a maxim of our law, that all land was held mediately or immediately of the king, in whom resided the *dominium directum*; while the subject enjoyed only the *dominium utile*, or the present cultivation and fruits of it.

This position led to consequences of the Nature of greatest importance. Military service being tenures. required by an express statute, the other effects of tenure were deductions from the nature of that establishment. As all the king's tenants were supposed to have received their lands by the gift of the king, it seemed not unreasonable, that, upon the death of an ancestor, the heir should purchase a continuance of the king's favour, by paying a sum of money, called a *relief*, for entering into the estate. As he would be bound to the same service to which his ancestor was liable, and which was the only return that could be made in consideration of his enjoying the property, it seemed reasonable that the king should judge, whether he was capable, by his years, of performing the services: if not, that *he*, as lord, should have the *custody of the land* during the infancy; by the produce of which he might provide himself with a sufficient substitute, and in the mean time have the care or *wardship* of the infant's person, in order to educate him in a manner becoming the character he was to support as his tenant. If the ward was a female, it seemed equally material to the lord, that she should connect herself in marriage with a proper person; so that the disposal of her in *marriage* was also thought naturally to belong to the lord.

The obligation between lord and tenant so united their interests, that the tenant was likewise bound to afford *aid* to his lord, by payment of money on certain emergent calls respecting himself or his family; namely, *when he*

married his daughter, when he made his son a knight, or when he was taken a prisoner.

Besides these incidents, it was held that land should *escheat*, or fall back into the hands of the lord, for want of heirs of the tenant, or for the commission of certain crimes; and, in cases of treason, that it should come into the hands of the king by *forfeiture*.

These were the fruits and consequences the king expected to receive from the doctrine of tenure; these he demanded as lord from his tenants; and they, in the character of lords, exacted many of the like kind from theirs. In this manner was the feudal bond rivetted on the landed property of the whole kingdom.

Different kinds of tenure. Thus far of the nature of tenures in general: but tenure was of two kinds; tenure by *knight-service*, and tenure in *soccage*. Tenure by knight-service was, in its institution, purely military, and the genuine effect of the feudal establishment in England (*a*): the services were occasional, though not altogether uncertain, each service being confined to forty days. This tenure was subject to *relief*, *aid*, *escheat*, *wardship*, and *marriage*. *Soccage* was a tenure by any conventional service not military. Knight-service contained in it two species of military tenure; *grand* and *petit serjeanty*. Under tenure in *soccage* may be ranked two species; *burgage*, and even *gavelkind*, though the latter has many qualities different from common *soccage*. Besides these, there was a tenure called *frankalmoigne*. This was the tenure by which religious houses and religious persons held their lands; and was so called, because lands became thereby exempt from all service, except that of prayer and religious duties. Such persons were also said to hold *in liberâ eleemosynâ*, or in free alms.

Thus far of free-tenure, by which the *liberi homines* of the kingdom became either tenants by knight-service, or in common *soccage*. It is thought, that the condition of the lower order of *ceorls* (*b*), who among the Saxons were in

(*a*) Wright Ten. 140.

(*b*) P. 5.

a state of bondage, received an improvement under this new polity. Nothing is more likely (a) than that the Normans, who were strangers to any other than a feudal state, should, to a certain degree, enfranchise such of those wretched persons as came into their power, by permitting them to do *fealty* for the scanty subsistence which they were allowed to raise on their precarious possessions; and that they were permitted to retain their possession on performing the ancient services. But, by doing fealty, the nature of their possession was, in construction of the new law, altered for the better; they were by that advanced to the character of *tenants*; and the improved state in which they were now placed, was called the tenure of Villenage. *villenage*. Elevated to this consideration, they were treated with less wantonness by their lords, who, after receiving their *fealty*, could not in honour or conscience deprive them of their possessions, while they performed their services. But the conscience and honour of their lord was their only support. However, the acquiescence of the lord, in suffering the descendants of such persons to succeed to the land, in a course of years advanced the pretensions of the tenant in opposition to the absolute right of the lord; till at length this forbearance grew into a permanent and legal interest, which, in after-times, was called *copyhold tenure* (b). *Copyholds*.

The military service due from tenants underwent an alteration in the reign of Henry II. The attendance of a knight only for forty days, was very inadequate to the grand purposes of war; which, besides the delay from unavoidable accidents, often consisted in many tedious operations, before an expedition could accomplish its end: while, on the other hand, that short service was highly inconvenient to the tenant; who, perhaps, came from the northern parts of this kingdom to perform his service in a province of France.

(a) Wright Ten. 216.

(b) Ibid. 220.

Sensible of these inconveniences, Henry II. in the fourth year of his reign, devised a commutation for these services, to which was given the name of *escuage*, or *scutage*. He published an order, that such of his tenants as would pay a certain sum, should be exempted from service, either in person or by deputy, in the expedition he then meditated against Tholouse. This sort of compromise was afterwards continued; and *tenure by escuage* became a new species of military tenure, springing from the advantage some tenants by knight-service had taken of this proposition^(a) made by the king.

In the same reign, a remission of the old service, which had in some degree been conceded by Henry I. was ratified to soccage tenants; who grew now into the habit of paying a certain sum in money, instead of rents in kind.

Consequences of tenure. Having so far considered the quality or conditions of tenure, as introduced by the Norman system; let us now examine the nature of that *estate* or interest a person might have in land, together with such incidents of ownership as naturally occur upon reflecting on property. The polity of tenures tended to restrict men in the use of that, which, to all outward appearance, was their own. When the land of the Saxons was converted from allodial to feudal, as above described, it could no longer be aliened without the consent of the lord, nor could it be disposed of by will. These, with other shackles, sat heavy upon the possessors of land; nor were at last removed, but by frequent and gradual alterations, during a course of several centuries. The history of these alterations in the descent, alienation, and other properties of feuds, is wrapt in obscurity during this early period; however, we will endeavour to trace such circumstances relating to it, as can be collected from the scanty remains of antiquity.

Of primogeniture. By the introduction of tenures, there is no doubt but *primogeniture*, or a descent of land

(a) A. D. 1159. Vide Spelm. Cod. in Wilk. Leg. p. 321.

to the eldest son, began to prevail; yet it is found, that as low down as the reign of Henry I. (a), the right of primogeniture was so feeble, that, if there were more than one son, the succession was divided, and the eldest son took only the *primum patris fædum* (b); the rest being left to descend to the younger son or sons: but this soon went out of use, or was altered by some statute now lost; for in the reign of Henry II. the eldest son was considered as sole heir: and so fixed was his right of succession to an inheritance held by his ancestors, that it could not be disappointed by alienation. Thus stood the law with regard to tenures by knight-service; but the same reasons not holding with respect to soccage-lands, they were not subject to the same law; for so late as the reign of Henry II. the sons succeeded to soccage-lands *in capita* equally; but the capital messuage was to go to the eldest son; for which, however, he was to make proportionate recompence to the others. But this partible inheritance in soccage-land was not universal; for, if it was not by custom divisible (c), the eldest son was heir to the whole. Both in knight's-service and soccage, if a person died leaving only daughters, they all succeeded jointly and equally, the capital messuage being given to the eldest daughter, upon the terms above-mentioned.

The right of *representation* in prejudice of proximity of blood, though, perhaps, not an unlikely consequence of the legal notion of primogeniture, did not so soon establish itself. The minds of men revolted at a rule which gave the inheritance to an infant, only because he represented the person of his father, in exclusion of the uncle, who was nearer of blood to the grandfather, from whom the fee descended; especially when regard must be had to the calls of military service, which an infant tenant was not capable of performing. If to these considerations we add the little tenderness that was shewn to the titles of such feeble claimants in those days of violence and oppression, we can easily account for

(a) Leges 17.

(b) Hale's Hist. Com. Law, 255.

(c) Si non antiquitus divisum. Glanv. lib. 7. c. 3.

the slow progress which was made towards establishing the right of representation.

With all these reasons against it, representation was not admitted as a rule of descent, even so low down as the reign of Henry II. Glanville states this very point, as a matter concerning which there was a variety of opinions in his time. A man, says he, dies leaving a younger son, and a grandson by his elder son; and it was a question between the son and the grandson who should succeed. Glanville seems to think, that if the eldest son had been *foris-familiated*, that is, provided for by a certain appointment of land at his own request, the grandson should have no claim against his uncle respecting the remainder of the inheritance of the grandfather; though perhaps the eldest son might himself, had he survived (*a*).

As the descent of crowns kept pace with the descent of private feuds, we may, from this doubt in Glanville, be able to account for the conduct of king John in excluding his nephew Arthur from the throne; and from the different opinions which were then held concerning it, we may collect, that he had some colour of right and law for what he did; the rules of inheritance, as to the point then in question, not being precisely ascertained and settled. In France, where the right of representation had more generally obtained, that king was clearly esteemed an usurper; and as such, his title denied and opposed. In England, where that mode of descent had not yet been fully fixed, he was more generally held to be in lawful possession; or, at least, the objection to his right was such as admitted much debate and question. At what precise time these doubts were removed, and representation became universally regarded as a rule of descent, can only be conjectured. Probably, in the latter part of this very reign, when such a notorious event was recent, and had brought the subject under examination, our law of descents received this new modification from the Continent (*b*).

(*a*) Lib. 7. c. 3.

(*b*) Dalr. Feud. 212.

When the succession of collaterals first took place, and when representation amongst collaterals, is involved in equal obscurity; we only know, that in the time of Henry II. the law was settled in this manner. In default of lineal descendants, the brothers and sisters came in; and if they were dead, their children; then the uncles (*a*), and their children; and lastly, the aunts (*b*), and their children; observing still the above distinction between knight's-service and soccage, and between males and females (*c*).

The law of feuds prevailed in this country as a custom, grounded upon the admission of the 52d and 58th laws of William the Conqueror. The particular rules and maxims of it gained footing imperceptibly, borrowed perhaps from foreign systems, but more commonly deduced by the analogy of technical reasoning. The effect of them upon our land is seen and known; but their source, or the time of their origin, is too remote and obscure to be pursued at this day (*d*).

The restraint on alienation was a striking part of the feudal polity. This restraint was ^{Of alienation.} partly in favour of the superior lord, and partly in favour of the heir of the tenant. Whichsoever of these considerations imposed the first restriction, it is certain the first relaxation of it contained a caution that regarded the interest of the heir. A law of Henry I. says, *Acquisitiones suas det cui magis velit; si Bocland autem habeat, quam ei parentes sui dederint, non mittat eam extra cognationem suam* (*e*). This permission, which enabled a man to disappoint his children of his lands *purchased*, was qualified in the time of Henry II.; for then it was laid down for law, that a man should alien only part of his purchased land, and not the whole, because he should not *filium suum hæredem exhæredare*. But if he had neither son nor daughter, he might then alien a part, or even the whole, in fee (*f*). And though he had children, he might alien all

(*a*) *Avunculi*. (*b*) *Materteræ*. (*c*) *Glanv. lib. 7. ca. 4.* (*d*) *Ingredieturque solo, et caput inter nubila condit.* (*e*) *Leg. Hen. I. 70.* (*f*) *Glanv. lib. 7. c. 3.*

his purchased lands; *provided* he had also lands by inheritance, out of which his children might be portioned. It was thought reasonable, that a man should have liberty to dispose of such lands as he had, by his own purchase, procured to himself; but the genius of this law would not so far dispense with its usual strictness, as to allow him altogether to disinherit his children.

The alienation of purchased lands led to the alienation of lands coming by descent; but this was under certain qualifications, and not without the like restraints which we have before mentioned in the case of purchased lands. Part only of an inheritance, which had descended through the family, could, in the reign of Henry II. be given to whomsoever the owner pleased; so that, upon the whole, a person in his life-time might, in some cases, dispose of all his purchased lands, and a reasonable part of those taken by descent, but could give neither of them by will (a).

It is an opinion, that (b) alienation first became frequent in burgage-tenures. It seems as if the holding in them was never very strict; and, as persons living in that sort of society sooner got loose from an habitual reverence for tenure, and, from their occupation, stood in need of a more exchangeable property, it is probable, alienations might happen there more early than among other tenants.

When alienations had become established in burgage-tenures, the alienation of purchased lands in many instances, and of lands descended in some, was by degrees permitted, as we have before seen. All these alterations broke in upon the original notion of tenure and its qualities; and in the reign of king John prevailed to such a degree, as to occasion the restrictions imposed by the Great Charter. Thus far of tenures and their incidents, of which we shall take our leave for the present (c).

(a) Glanv. lib. 7. c. 3. (b) Dalr. Feud. Prop. 99.

(c) Such is the shape which the feudal polity, after its introduction into this country, gradually assumed. This singular system has, of late, been

The judicature of the kingdom was thrown into a system conformable to the new polity. The objects which first present themselves, on contemplating the introduction

much discussed by writers on the English law and constitution; who, in order to procure every light that could illustrate the subject, have pursued their inquiries beyond the limits of the law of this country; have entered into the rise and progress of feuds among the northern nations in their different settlements, particularly in France; have examined the nature and design of the several species of tenures, and investigated with minuteness their distinct incidents and properties. This has introduced a new branch of study among the students of the common law; which, like other novelties, has been followed with great avidity; and I am ready to admit, that the knowledge of our law and constitution has been thereby greatly promoted. It is not then through any disapprobation of these pursuits that I have thus shortened the account of the feudal system; but for reasons that, I trust, will have the same weight with the reader which they have had with me. In a history of the law, a due portion of attention must be allotted to each subject that comes under consideration. *English* feuds are entitled to a share, and, taken in all their branches, will be found to have a very large share of the ensuing History. The prospect of this heap of matter, in addition to numerous other objects, made it necessary that every thing extraneous and foreign, every thing that might, perhaps, illustrate, but certainly made no part of our common law, should be dropped entirely. Of the latter description are the far greater, and the more entertaining and splendid portions of those treatises which have lately been written professedly on the feudal system. To such, therefore, I must beg to refer those who are more curious; I mean, among others, to *Dalrymple*, to *Sullivan*, and to *Wright*; and those who wish to go farther, to *Spelman*, to *Craig*, to *Corvinus*, to *Zasius*, and to the *Two Books of Feuds*.

The reader of the History of English Law, pausing, as he now does, at the period of the Conquest, and, looking down to the present time, through the ages of Glanvil and Bracton, Britton and Fleta, the Statutes, the Year-Books, and the Reporters, must feel that he, as well as the writer, has enough upon his hands, without engaging in any curious inquiry about the origin and nature of the feudal system in general; he will also perceive that this topic, compared with the numerous and important objects that crowd on his imagination, is small and inconsiderable.

When I say small and inconsiderable, I beg to be understood in the sense which many are too apt to give to the term *feudal system*. Persons who most insist upon this point seem to exclude from it every thing that is *English*; and it can be in no other sense of it that the present History has been thought, as I am told, to contain too little discussion upon the feudal system. Why the feudal system, in this new-fangled sense, should make so small a part of the present History, can be easily accounted for by the reader of it.

Feuds, properly so called, namely those at the will of the lord, were no part of the system established by William; his famous law expressly declares, that he had granted them *jure hæreditario*. The uncertain casualties of tenures were soon ascertained by express charters of liberties, repeatedly granted by our Norman kings. On the death of the ancestor, the fee was cast upon the heir by construction of law, who entered as into a patrimonial, not a feudal property. Such was the law of English tenures, at their earliest appearance; and to this it is to be attributed, that through all our Law-books and Reports, from Bracton to Coke, and further down,

of Norman judicature, are the separation of the ecclesiastical from the temporal court, and the establishment of the *curia regis*. By an ordinance of William the Conqueror,

there is no allusion, no reasoning, that bears any relation to feuds or feudal law, in this sense of it; and those who have arraigned Lord Coke for his silence on this head, have passed, in my mind, a very hasty judgment on the extent of that great lawyer's learning.

Comparing the above sense of feudal, with this account of our tenures, every idea that is English is not improperly excluded from that system; and that system is very properly excluded from a History of the English Law; the persons therefore who hold the above language, ought not to mention this as a defect in the present work.

But this sense of feudal seems to me too narrow and partial; and I should think it owes its application more especially to some Scotch writers, who have lately taken a lead in historical inquiries; and who, imagining they had brought to light certain principles and foundations of English law, of which English lawyers were ignorant, are never satisfied with displaying this supposed triumph. But the want of discernment, upon this point of juridical history, is in themselves, and not in us. It is indeed true, that the Scotch law is strictly feudal. It was so in its foundation; and it seemed the employment of lawyers to give a feudal turn to every consideration that could arise on the modifications of property. New feudal fancies were adopted; the most simple points were distorted to apply them to feudal principles; matters in which the English and Scotch law agreed were disfigured by the superinduction of some feudal device. This affectation has prevailed among lawyers almost down to the present day; and it is not to be much wondered, that persons who consider this subject historically, seeing how little change had been made in their law during so many centuries, and that lawyers, by referring continually to first feudal principles, had rather been going backwards than proceeding, should lay such great stress upon the study of feuds in their first origin. But they carry the prejudices of their countrymen too far, when they expect the same line to be taken by English lawyers who make similar inquiries into the history of *their* jurisprudence.

If the Scotch law has been corrupted by too great attention to feudal principles, the only natural way of accounting for difficulties and obscurities in it, is by recurring to the same sources. Those too who study the History of English Law, must tread in the footsteps of the old English lawyers; but these lead not to the *Books of Feuds*, much less to *Craig* or *Corvinus*. The lawyers of this country, like the people, impatient of foreign innovations, soon moulded the institutions of Normandy into a new shape, and formed a system of feuds of their own. The usage and custom of the country became the guide of our courts; who have invariably rejected with disdain all arguments from the practice of other countries.

For a knowledge of the feudal system, as far as concerns an English lawyer, we are to look no farther than *Glanville*, *Bracton*, and *Littleton*. And as far as it is to be collected from the works of these and other English lawyers, the feudal system of England respecting landed property is discussed in this and the subsequent parts of this History (as I should think) at as great length as could conveniently be done consistent with the plan of such a work. If it is wished that this should be compared with the like system in Scotland, in France, in Lombardy, or elsewhere, I can only say, that such an inquiry does not seem to me to suit a work like the present, though it would be very proper in a general history of feudal law.

the bishop, with all ecclesiastical causes, was separated from the sheriff; and the ealderman, or earl, receiving a feudal character, begun to hold his county court as the feudal lords did theirs. This was done by the *sheriff*, who, soon after the Conquest, if not before, grew to be a different person from the *earl*. The periodical circuits henceforth ceased, and the county court and tourn were held in a certain place. In the former, the *vicecomes* or sheriff, acting for the earl, used to preside, and the freeholders, as before, were judges of the court. The latter, notwithstanding the absence of the bishop, soon afterwards received new splendor and importance from a law of Henry I. which required all persons, as well peers as commoners, clergy as well as laity, to give attendance there, to hear a charge from the sheriff, and to take the oath of allegiance to the king. This obliged the greatest lords of the kingdom to submit

It is not only on the subject of feuds that I have studiously avoided any inquiry beyond the pale of the English law; in many other instances, where the English system might seem, in a very particular manner, to coincide with, or intersect any foreign scheme of jurisprudence, I have invariably forborne making such observations, as a comparison of the two subjects would easily suggest. The design of this History seemed to make it absolutely necessary to adhere to this plan. To investigate the first principles of our law, and to pursue them through all the modifications and applications, all the additions and changes to which they were subjected in different periods of time, is an inquiry that called upon the writer rather to reduce and simplify his materials, than to seek for new ones, or extend his views. That the result of such an inquiry might be delivered to the Reader with fidelity, I thought it safer to abstain altogether from topics of a foreign nature, confining myself to such as have, in their turn, prevailed in our courts, and among practitioners. It was the latter upon which the utility of the present historical process was to depend; and the less they were mixed with the former, the deduction would be more easy, and every conclusion arising from it would be better founded.

This had become more especially necessary with respect to the feudal system. The present fashion of treating this subject, if it had taught something useful, had also taught much that was to be unlearned. *Glanville* and *Craig*, *Bracton*, and *the Book of Feuds*, have been quoted in a promiscuous manner, as if those authors wrote upon the same system of feuds. Thus is the student's mind bewildered with accounts of a polity made up from different countries, and prevailing in none; and, after all, is left uninformed what is the genuine nature of *English feuds*. It seems, therefore, a new and very material object to a writer of the English law, to give an account of *the feudal system* in England, from English authors alone.

to frequent remembrances of their subordinate station; and so contributed to draw closer the bands of political union. In other respects, these old Saxon courts seemed to continue in their original state. In the county court were held civil pleas; and in the tourn were made all criminal inquiries. Every manor had its court baron, where the lord was to hold plea and transact matters respecting certain rights and claims of his own tenants, and for the punishment of nuisances and misdemeanors arising within the manor; from all which courts, on failure of justice, there lay an appeal to the sheriff's court, and from thence to the king's supreme court. Many lords had franchises to hold hundred and other courts, both civil and criminal; and there are some few instances, where the crown had granted to a great lord the *jura regalia* of a certain district; erecting it into a county palatine, distinct from, and exclusive of, all jurisdiction of the king's courts. William granted the county of Chester to *Hugh Lupus*; *hunc totum comitatum tenendum sibi et hæredibus ita liberè ad gladium, sicut ipse rex tenebat Angliam ad coronam*. The like ample grant was soon after made of the bishopric of Durham to that prelate; and in later times grew up the franchise of Ely and Hexham, the counties palatine of Lancaster and of Pembroke (a).

The curia regis. The supreme court of ordinary judicature established by William the Conqueror, was the *aula regis*, or *curia regis*; so called, because it was held in the king's palace, before himself, or his justices, of whom the *summus justitiarius totius Angliæ* was chief. There was also the exchequer, called *curia regis ad scaccarium* (b); which was held likewise in the king's palace, either before the king or his grand justiciary; and, though in effect a member of the *curia regis*, was expressly distinguished from it. In what manner the grand justiciary, who presided in both these courts, ordered or distributed between them the several pleas instituted there,

(a) Vid. 4 Inst. 211.

(b) Wilk. Leg. Sax. 288. p.

or in what manner these pleas were conducted, it is difficult at this distance of time precisely to determine (a). Respecting the nature of this obsolete judicature little more can be hoped than such conjectures as may be founded on the few remaining monuments of antiquity.

The *curia regis* consisted of the following persons: the king himself was properly head, and next to him was the grand justiciary, who, in his absence, was the supreme head of the court: the other members of this court were the great officers of the king's palace; such as the treasurer, chancellor, chamberlain, steward, marshal, constable, and the barons of the realm. To these were associated certain persons called *justitiæ*, or *justitiiarii*, to the number of five or six; on whom, with the grand justiciary, the burthen of judicature principally fell; the barons seldom appearing there, as little valuing a privilege attended with labour, and the discussion of questions ill-suited to their martial education. The justices were the part of this court that was principally considered, as appears by the return of writs, which was *coram me vel justitiis meis*; unless that appellation may be supposed to include every member thereof in his judicial capacity.

All kinds of pleas, civil and criminal, were cognizable in this high court (b); and not only pleas, but other legal business arising between parties was there transacted. Feoffments, releases, conventions, and concords of divers kinds were there made, especially in cases that required more than common solemnity (c). Many pleas, from their great importance, were proper subjects of inquiry there; others were brought by special permission of the king and his justices.

The course of application to the *curia regis* was of this nature. The party suing paid, or undertook to pay, to the king a fine to have *justitiam et rectum* in his court: and

(a) Mad. Ex. 57.

(b) Ibid. 70.

(c) Ibid. 77.

thereupon he obtained a writ or precept, by means of which he commenced his suit; and the justices were authorized to hear and determine his claim. These writs were made out in the name and under the seal of the king, but with the *teste* of the grand justiciary; for the making and issuing of which (as well as for other offices) the king used to have near his person some great man, usually an ecclesiastic, who was called his *chancellor*, and had the keeping of his seal: under the chancellor were kept clerks for making these writs. It was probably this office of the chancellor that rendered him a necessary member of the *curia regis*; to which, in fact, and to the justices, and not to the king, suitors made their complaint, and, upon paying the usual fine, were referred to the chancellor to furnish them with a writ.

As the old establishment of the Saxons for determining common pleas in the county court was continued, very few of those causes were brought into the *curia regis*. While men could have justice administered so near their homes, there was no temptation to undergo the extraordinary expence and trouble of commencing actions before this high tribunal; but the partiality with which justice was administered in the courts of arbitrary and potent lords, often left the king's subjects without prospect of redress in the inferior jurisdictions: the king and the *curia regis* became then an asylum to the weak. It is not remarkable, that suitors coming to a court under such circumstances should consent to purchase the means of redress by paying a fine. Upon such terms was the *curia regis* open to all complainants; and the institution of suits was eagerly encouraged by the officers of that court.

The exchequer was a sort of *subaltern* court, resembling in its model that which was more properly called the *curia regis*. Here, likewise, the grand justiciary, barons, and great officers of the palace presided. The persons who were justices in the *curia regis*, acted in the same capacity

here; this court being very little else than the *curia regis* sitting in another place, namely, *ad scaccarium*; only it happened, that the justices, when they sat at the exchequer, were more usually called *barons*. The administration of justice in those days was so commonly attendant on the rank and character of a baron, that *baro* and *justitiarius* were often used synonymously (a).

Affairs of the revenue were the principal objects of consideration in the court of exchequer. The superintendence of this was the chief care of the justiciary and barons: the cognizance of a great number of matters followed as incident thereto; as the king's revenue was, in some way or other, concerned in the fees, lands, rights, and chattels of the subject; and ultimately in almost every thing he possessed.

However, it is thought the court of exchequer was not so confined to the peculiar business assigned it, and its incidents, as not to entertain such suits of a general nature as were usually brought in the *curia regis* (b): and it is probable, this usage of holding common pleas at the exchequer continued till the time when common pleas were separated (c) from the *curia regis*; and that both courts ceased to hold plea of common suits at the same time, and by the same prohibition. Other legal business, like that in the *curia regis*, was also transacted at the exchequer: charters of feoffment, confirmation, and release, final concords, and other conventions, were executed there before the barons (d); all which, added to the consideration that the constituent members were the same, put the court of exchequer very nearly on an equality with the *curia regis*.

By the multifarious and increasing business of these two courts, the grand justiciary and his assessors on the bench found themselves fully occupied; and as the application to

(a) Mad. Ex. 134.

(b) Ibid. 141.

(c) By the Great Charter.

(d) Mad. Ex. 145.

these courts became more frequent, it was judged necessary, both in aid of themselves and in relief of suitors, to erect some other tribunal of the same nature. Accordingly ^{Justices itinerant.} justices were appointed to go *itineras*, or circuits through the kingdom, and determine pleas in the several counties. To these new tribunals was given a very comprehensive jurisdiction. As they were a sort of emanations from the *curia regis* and exchequer, and were substituted in some measure in their place (except with the reservation of appeal thereto) they were endowed with all the authorities and powers of those courts. These *justices itinerant* or *errant*, in their several *itineras*, or *eyres*, held plea of all causes, whether civil or criminal, and in most respects discharged the office of both the superior courts. The characters of the persons entrusted with this jurisdiction were equal to the high authority they exercised; the same persons who were justices in the king's court being, amongst others, justices itinerant. They acted under the king's writ in nature of a commission; and they went generally from seven years to seven years; though their circuits sometimes returned at shorter intervals. Their circuits became a kind of limitation in criminal prosecutions, as no one could be indicted for any thing done before the preceding *eyre*.

The administration of justice in the county and other inferior courts, notwithstanding some striking advantages, was certainly pregnant with great evils. The freeholders of the county, who were the judges, were seldom learned in the law; for, although not only they, but bishops, barons, and other great men, were, by a law of Henry I. appointed to attend the county court (by which they might, after time and observation, qualify themselves to act in the office of magistrates), the study and knowledge of the laws was confined to a very few. Again, the determinations of so many independent judges, presiding in the several inferior courts dispersed about the country, bred great variety in the laws, which, in process of time, would have

habituated different counties to different rules and customs, and the nation would have been governed by a variety of provincial laws. Besides these inherent defects, it was found that matters were there carried by party and passion. The freeholders, often previously acquainted with the subjects of controversy, or with the parties, became heated and interested in causes; which, added to the influence of great men, on whom they were too much dependent by tenure or service, rendered these courts extremely unfit for cool deliberation and impartial judgment. Nor were these difficulties remedied by the power of bringing writs of false judgment, and thereby removing a cause into the *curia regis*, though the penalty of amercement on the suitors of the county court, for errors in judgment, was sufficiently severe. If these objections lay against the king's courts in the county, much more did they against those of great lords; who made the awards of justice subservient to their own schemes of power and aggrandisement.

Besides these, there were reasons of a political nature which dictated an establishment of this kind: this was, to obviate the mischiefs arising to the just prerogatives of the crown from the many hereditary jurisdictions introduced under the Norman system. A judicial authority exercised by subjects in their own names, must considerably weaken the power of the prince; one of whose most valuable royalties, and that which most conciliates the confidence and good inclinations of his people is, the power of providing that justice should be duly administered to every individual. Though the appeal from the hundred to the court of the sheriff (an officer of the king) so far kept a check upon the jurisdiction of lords, yet it was still to be wished that the inconvenience of appeals should be precluded, and that justice should be administered in the first instance by judges deriving their commission from the king (a). If these reasons induced the crown to promote

(a) Litt. Hen. II. vol 5. 273.

such an institution as this; the state of things in the country was sufficient reason with the people to desire, with the most ardent wishes, the occasional visits of a regal jurisdiction, like that of the *eyre*.

It is not easy to determine the exact period when this establishment of *justices itinerant* was first made. It has long been the common opinion, that they were first appointed in the great council held at Nottingham, or, as some say, at Northampton, in the twenty-second year of Henry II. A. D. 1176, when the king, by the advice of the great council, divided the realm into six circuits, and sent out three justices in each to administer justice.

It is true, that the first mention of these justices, in our old historians, is under this year; but it has been proved from the authority of records in the exchequer (*a*), that there had been justices itinerant, to hear and determine civil and criminal causes, in the eighteenth year of the reign of Henry I. and likewise justices in eyre for the pleas of the forest. It also appears by the same authority, that in the twelfth, and from thence to the seventeenth of king Henry II. A. D. 1171, justices of both kinds had been constantly sent into the several counties. It is thought (*b*), that the first appointment of justices itinerant was made by Henry I. in imitation of a like institution in France, introduced by Louis le Gros (*c*); that in the reign of king Stephen, continually agitated by intestine commotions, this new-adopted improvement was dropped; and was again revived by Henry II. who at length fixed it as a part of our legal constitution. It appears from the records above alluded to, that during great part of the reign of Henry II. pleas were held in the counties by the justices itinerant from year to year.

The *itineras*, or circuits appointed at the council of Northampton were six; on each of which went three jus-

(*a*) Mad. Ex. 96.

(*b*) Litt. Hen. II. vol. 4. 271.

(*c*) But see Schmidt des Deutschen Geschichte, vol. 1. 586. and The Missi appointed by Charles the Great, vol. H. 121.

tices. The counties assigned to each of these circuits were as follow : in one, the counties of *Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex, Hertford*; in another, *Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, Leicester*; in another, *Kent, Surrey, Southampton, Sussex, Berks, Oxford*; in another, *Hereford, Gloucester, Worcester, Salop*; in another, *Wilts, Dorset, Somerset, Devon, Cornwall*; in another, *York, Richmond, Lancaster, Copland, Westmoreland, Northumberland, Cumberland*.

About three years after this (A. D. 1179), some alteration was made in this arrangement of *itineræ*; for, at a great council held at Windsor, the kingdom was parcelled out into four circuits only, in the following order: in the first were the counties of *Southampton, Wilts, Gloucester, Dorset, Somerset, Devon, Cornwall, Berks, Oxford*; in the second, *Cambridge, Huntingdon, Northampton, Leicester, Warwick, Worcester, Hereford, Stafford, Salop*; in the third, *Norfolk, Suffolk, Essex, Hertford, Middlesex* (the county of *Middlesex* not being included in the former division at all), *Kent, Surrey, Sussex, Buckingham, Bedford*; in the fourth, *Nottingham, Derby, York, Northumberland, Westmoreland, Cumberland, Lancaster*. As each of these *itineræ* contained more counties than the former division, they had also more justices assigned: the first three had each five justices; and the last, which was much the greatest circuit, had six (a). There is no mention of any further alteration of the circuits during the period of which we are now treating.

The justices appointed in the year 1176, were directed and empowered to do, in their *itineræ*, all things of right and justice which belonged to the king and his crown, whether commenced by the king's writ or that of his vicerent, where the property in question was not more than half a knight's fee; unless the matter was of such importance that it could not be determined but before the king;

(a) Vide Leg. Ang. Sax. p. 332, 333.

or the justices themselves, on account of any difficulty therein, chose to refer it to the king, or, in his absence, to those who were acting for him. They were commanded to make inquisition concerning robbers, and other offenders, in the counties through which they went; they were to take care of the profits of the crown, in its landed estates and feudal rights of various sorts, as escheats, wardships, and the like; they were to inquire into castle-guards, and send the king information from what persons they were due, in what places, and to what amount; they were to see that the castles which the great council had advised the king to destroy, were demolished, under pain of being themselves prosecuted in the king's court; they were to inquire what persons were gone out of the realm, that if they did not return by a certain day to take their trial in the king's court, they might be outlawed; they were to receive, within a certain limited term, from all who would stay in the kingdom, of every rank and condition, (not even excepting those who held by tenures of villenage) oaths of fealty to the king, which if any man refused to make, they were to cause him to be apprehended as the king's enemy; and moreover, they were to oblige all persons from whom homage was owing, and who had not yet done it, to do it to the king within a certain time, which the justices themselves were to fix.

The principal part of these injunctions was given in consequence of the late civil war; but some constitutions made at Clarendon, relating both to civil and criminal justice, were renewed at this same council at Northampton; and the justices itinerant then appointed were sworn to observe and execute those regulations in every point. Amongst other provisions of this statute, the justices were to cause recognition to be made whether a man died seised of land concerning which any doubt had arisen; and they were likewise to make recognition *de novis disseisinis* (a).

(a) Litt. Hen. II, vol. 4. 275. 406.

This was the whole authority given to the justices itinerant by the statute of Northampton; how the objects of their jurisdiction were multiplied will presently appear, when we come to mention those schedules, called *capitula itineris*, which used to be delivered to the justices for their direction. In executing the king's commission, the plan of this institution was improved still further; for, that justice might not always be delayed in criminal cases till the justices itinerant came into the country, commissions used to be occasionally issued, empowering the justices therein named to make a *delivery of the gaol* specified in the commission; that is, they were, by due legal examination, to determine the fate of all the prisoners, ordering a discharge of such who were acquitted upon trial, and continuing in further custody, or otherwise directing punishments to be inflicted on those who should have been convicted of any crime. But when these commissions were first brought into use, it does not appear.

It was some time after the appointment of justices itinerant that a court made its ap-^{The bench.}pearance under the name of *bancum*, or *bench*, as distinguished from the *curia regis*. This court, like that of the justices in eyre, was probably erected in aid of the *curia regis*; and it is observable, that the *curia regis* ceased to entertain common pleas in its ordinary course, much about the same time when the *bancum*, or *bench*, is supposed to have been erected. It is not likely this alteration was made *uno ictu*, but by degrees. It had evidently been the usage to hold pleas in the *bank* before the charter of king John, as *justitiiarii nostri de banco* are therein mentioned; so that the clause declaring, that *communia placita non sequantur curiam nostram, sed teneantur in certo loco*, can no otherwise be understood, than as contributing to settle and confirm what had been begun before. In truth, the existence of the *bench*, and of the *justitiiarii de banco*, appears from records in the reign of Richard I. At that pe-

riod certain descriptions came in use which were not before known, and which plainly and clearly mark the existence of such a court; such as, *curia regis apud Westmonasterium*, *justitiarum regis apud Westmonasterium*, or *de Westmonasterio*, *bancum*, and *justitiarum de banco* (a); from all which it may be collected, that common pleas were at this time moving off from the *curia regis*, and were frequently determined in a certain place, whose style was meant to be described in those expressions.

It has been observed (b), that after the erection of the bank, the style of the superior court began to alter; and the proceedings there were frequently said to be *coram rege*, or *coram domino rege*; and in subsequent times the court was styled *curia regis coram ipso rege*, or *coram nobis*, or *coram domino rege ubicunque fuerit*, &c. as at this day (c). However, it was still called *aula regis*, *curia regis*, *curia nostra*, *curia magna*.

As the exchequer was a member of the *curia regis*, and a place for determining the same sort of common pleas as were usually brought in the *curia regis*, the separation of such pleas from that court did considerably affect the exchequer. The clause in king John's charter equally concerned both courts: *curiam nostram* meant the exchequer, as well as the court properly so called.

Thus have we seen this grand institution of the Normans dilating its influence over the whole kingdom, encroaching on the ancient local tribunals of the people, by drawing into its sphere all descriptions of causes and questions; till having exerted, as it were, its last effort, in sending forth the new establishments of justices itinerant and justices of the bench, it disappeared by degrees from the observation of men, and almost from the records of antiquity, having deposited in its retirement the three courts of common law now seen in Westminster-hall; the

(a) Mad. Ex. 539; 540.

(b) Ibid. 543.

(c) Ibid. 544.

court *coram ipso rege*, since called *the king's-bench*; the *bench*, now called *the common pleas*; and the modern court of *exchequer*.

The court of chancery probably acquired a separate existence much about the same time. ^{The chancery.}

The business of the chancellor was to make out writs that concerned proceedings pending in the *curia regis* and the exchequer. He used to seal and supervise the king's charters, and, whenever there arose a debate concerning the efficacy or policy of royal grants, it was to his judgment and discretion that a decision upon them was referred. He used to sit with the chief justiciary and other barons in the *curia regis* and at the exchequer, in matters of ordinary judicature and on questions of revenue; though it was to the latter court he seemed mostly allied in his judicial capacity (a). Mr. Madox, observing that the rolls of chancery begin in the reigns of Richard and John to be distinct from those of the exchequer (a method of arrangement not observed before) (b), is inclined to think that the chancellor began about that time to act separately from the exchequer. In this conjecture he strengthens himself by a corroborating fact, as he imagines. In the absence of king Richard out of the realm, William de Longchamp, chief justiciary and chancellor, was removed from the former office by the intrigues and management of John earl of Morton, the king's brother. After this, it is thought, he might discontinue his attendance at the exchequer; and the business of the chancery, which before used to be done there, might be transferred by him to another place, and put into a new method; in which it might be judged proper and convenient to continue it ever after, separate and independent.

If this conjecture may be admitted, concerning an establishment beyond the reach of historic evidence, the court of chancery was erected into a distinct court nearly at the same time when the other three received their present form

(a) Mad. Ex. 131.

(b) Ibid. 132.

and jurisdiction; which will go a great way towards justifying one part of the maxim of the common lawyers, that the four courts of Westminster-hall are all of equal antiquity; though it *refutes* the other part of it, that they have been the same as they now are from time immemorial.

The chancery was the *officina justitiæ*, the manufactory, if it may be so called, of justice, where original writs were framed and sealed, and whither suitors were obliged to resort to purchase them in order to commence actions, and so obtain legal redress. For this purpose the chancery was open all the year; writs issued from thence at all times, and the fountain of justice was always accessible to the king's subjects. The manner in which the business there was conducted, seems to have been this: the party complaining to the justices of the king's court for relief, used to be referred to the chancellor (in person, perhaps, originally), and related to him the nature of his injury, and prayed some method of redress. Upon this, the chancellor framed a writ applicable to the complainant's case, and conceived so, as to obtain him the specific redress he wanted. When this had been long the practice, such a variety of forms had been devised, that there seldom arose a case in which it was required to exercise much judgment; the old forms were adhered to, and became precedents of established authority in the chancellor's office. After this, the making of writs grew to be a matter of course; and, the business there increasing, it was at length confided to the chancellor's clerks, called *clerici cancellariæ*, and since *cursitores cancellariæ*. A strict observance of the old forms had rendered them so sacred, that at length any alteration of them was esteemed an alteration of the law, and therefore could not be done but by the great council. It became not unusual in those times for a plaintiff, when no writ could be found in chancery that suited his case, to apply to parliament for a new one.

Thus far the chancellor seemed to act as a kind of officer of justice, ministering to the judicial authority of the

king's courts. The chancellor's character continued the same, after this separation, as it had been before, without any present increase or diminution. In the reign of Henry II. he was called the second person in the government, by whose advice and direction all things were ordered. He had the keeping of the king's seal; and, beside the sealing of writs, sealed all charters, treaties, and public instruments. He had the conduct of foreign affairs, and seems to have acted in that department which is now filled by the secretaries of state. He was chief of the king's chaplains, and presided over his chapel. His rank in the council was high; but the great justiciary had precedence of him (*a*). He is said to have had the presentation to all the king's churches, and the visitation of all royal foundations, with the custody of the temporalities of bishops; but those writers who have taken upon them to speak fully of the office of chancellor, say nothing of any judicial authority exercised by him at this time. In the *curia regis* he was rather an officer than a judge; but as he assisted there, so he was sometimes associated with the justices in eyre (*b*). There is no notice, even in writers of a later date than this, neither in *Bracton* nor *Fleta*, that the chancellor, after he sat separate from the exchequer, exercised any judicial authority, or that the chancery was properly a court; but it is always spoken of as an *office* merely, bearing a certain relation to the administration of justice, in the making and sealing of writs.

Notwithstanding the hereditary lords absent-
ed themselves so entirely from the *curia regis*,
they still retained an inherent right of judicature, which
resided in them as constituent members of the council of
the king and kingdom. When the *curia regis* was divided,
and the departments of ordinary judicature were branched
out in the manner we have just seen, the peculiar character

Judicature of
the council.

(*a*) Mad. Ex. 42, 43. Litt. Hen. II. vol. 2. 312.

(*b*) Mad. Ex. 42.]

of this council, now separated and retired within itself, became more distinguishable.

This council was of two kinds and capacities: in one, it was the national assembly, usually called *magnum concilium*, or *commune concilium regni*; in the other, it was simply the *council*, and consisted of certain persons selected from that body, together with the great officers of state, the justices, and others whom the king pleased to take into a participation of his secret measures, as persons by whose advice he thought he should be best assisted in affairs of importance. This last assembly of persons, as they were a branch of the other, and had the king at their head, were considered as retaining some of the powers exercised by the whole council. As they both retained the same appellation, and the king presided in both, there was no difference in the style of them as courts; they were each *coram rege in concilio*, or *coram ipso rege in concilio*, till the reign of Edward I. when the term *parliament* was first applied to the national council; and then the former was styled *coram rege in parlamento*.

The judicial authority of the barons, which still resided with them after the dissolution of the *curia regis*, was this: they were the court of last resort in all cases of error; they explained doubtful points of law, and interpreted their own acts; for which purpose the justices used commonly to refer to the great council matters of difficulty depending before them in the courts below. They heard causes commenced originally there, and made awards thereupon; and they tried criminal accusations brought against their own members.

The *council*, properly so called, seems to have had a more ordinary and more comprehensive jurisdiction than the *commune concilium*; which it was enabled to exercise more frequently, as it might be, and was, continually summoned; while the other was called only on great emergencies. In the court held *coram rege in concilio*, there

seems to have resided a certain supreme administration of justice, in respect of all matters which were not cognizable in the courts below: this jurisdiction was both civil and criminal. They entertained inquiries concerning property for which the ordinary course of common-law proceeding had provided no redress, and used to decide *ex æquo et bono*, upon principles of equity and general law. All offences of a very exorbitant kind were proper objects of their criminal animadversion. If the persons who had taken part in any public disorder were of a rank or description not to be made amenable to the usual process, or the occasion called for something more exemplary than the animadversion which could be made by ordinary justices, these were reasons for bringing inquiries before the council: in these, and some other instances, as well touching its civil as criminal jurisdiction, it acted only in concurrence with, and in aid of, the courts below.

Thus was the administration of justice still kept, as it were, in the hands of the king; who, notwithstanding the dissolution of his great court, where he presided, was still, in construction of law, supposed to be present in all those which were derived out of it. The style of the great council was *coram rege in concilio*, as was that of his ordinary council for advice. The chancery, when it afterwards became a court, was *coram rege in cancellariâ*; and the principal new court which had sprung out of the *curia regis*, was *coram ipso rege*, and *coram rege ubicunque fuerit in Angliâ*.

The separation of ecclesiastical causes from civil, was not the least remarkable part of the revolution our laws underwent at the Conquest. The joint jurisdiction exercised in the Saxon times by the bishop and sheriff was dissolved, as has been before mentioned, by an ordinance of William; and the bishop was thenceforth to hold his court separate from that of the sheriff (a).

(a) Wilk. Leg. Sax. 292. Seld. Tithes, 413.

This ordinance of William is comprised in a charter relating to the bishopric of Lincoln; and therein he commanded, "that no bishop or archdeacon should thenceforward hold plea *de legibus episcopalibus* in the hundred court, nor submit to the judgment of secular persons any cause which related to the cure of souls; but that whoever was proceeded against for any cause or offence according to the episcopal law, should resort to some place which the bishop should appoint, and there answer to the charge, and do what was right (a) towards God and the bishop, not according to the law used in the hundred, but according to the canons, and the episcopal law." In support of the bishop's jurisdiction, it was moreover ordained, "that should any one, after three notices, refuse to obey the process of that court, and make submission, he should be excommunicated; and, if need were, the assistance of the king or the sheriff might be called in. The king moreover strictly charged and commanded, that no sheriff, *præpositus sive minister regis*, nor any layman whatsoever should intromit in any matter of judicature that belonged to the bishop (b)." This is the whole of that famous charter.

When the spiritual court was once divided from the temporal, different principles and maxims began to prevail in that tribunal. The bishop thought it no ways unsuitable, that subjects of a different nature from those concerning which the temporal courts decided, should be adjudged by different laws; and, being now out of the influence and immediate superintendence of the temporal judges, he was very successful in introducing, applying, and gaining prescription for the favourite system of pontifical law, to which every churchman, from education and habit, had a strong par-

(a) *Faciat rectum.*

(b) Wilk. Leg. Ang. Sax. pa. 292, 293.

tiality. The body of canon law soon exceeded the bounds which a concern for the government of the church would naturally affix to it. Instead of confining their regulations to sacred things, the canonists laid down rules for the ordering of all matters of a temporal nature, whether civil or criminal. The buying and selling of land, leasing, mortgaging, contracts, the descent of inheritance; the prosecution and punishment of murder, theft, receiving of thieves, frauds; these and many other objects of temporal judicature are provided for by the canon law; by which, and which alone, it was meant the clergy should be governed as a distinct people from the laity. This scheme of distinct government was, perhaps, not without some example in the practice of the primitive times; when it was recommended that christian men should accommodate differences among themselves, without bringing scandal on the church by exposing their quarrels to the view of temporal judges. For this purpose, bishops had their *episcoporum ecclidici*, or *church-lawyers*; and, in after-times, their officials, or chancellors: and when the Empire had become christian, the like practice continued, for similar reasons, with regard to the clergy. But this, which was in its design nothing more than a sort of compact between the individuals of a fraternity, was exalted into a claim of distinct jurisdiction, exclusive of the temporal courts, for all persons who came under the title of clerks, and for many objects which were said to be of a spiritual nature. This attempt was favoured by the separation now made, in this country, between the spiritual and temporal judges.

In the gradual increase of this clerical judicature separate from the temporal courts, we see the means by which the ecclesiastics in after-times were enabled to perfect their scheme of independent sovereignty, in the midst of secular dominion; whereby they assumed powers dangerous to the crown, and the political freedom of the state.

The increase of the clergy in power and consequence

was owing to the influence of the civil and canon law. With these instruments they ventured to encounter the established authority of the municipal law, whose dictates were so opposite to their grand schemes of ecclesiastical sovereignty.

Of the civil and canon law. Such an entire destruction had been made of every establishment by the Saxon invaders, that the Roman law was quite eradicated. The only remains of this law that could be picked up in the Saxon times, were from the code of Theodosius, and such scraps of Gaius, Paulus, and Ulpian, as still existed in some mutilated parts of the Pandects (*a*). These remnants of the civil law, like other learning, were mostly in the hands of ecclesiastics, who studied them with diligence. It was from these that they formed a stile, and learned a method, by which to frame their own constitutions; which were now growing to some magnitude and consequence, and began to claim notice as a separate system of law of themselves.

During the reigns of William the Conqueror and Rufus, we hear nothing in this country of the civil law (*b*); though the institute, the code, and the novels of Justinian, had been taught in the school of *Irnerius*, at Bologna, and there were even some imperfect copies of the Pandects in France; yet the study of the civil law did not go on with spirit; nor was that system of jurisprudence regarded with the universal reverence which it acquired afterwards, when a complete copy of the Pandects was found at Amalfi, A. D. 1137, at the time that city was taken by the Pisans (*c*).

The canon law first known in this country was formed by permission and under authority of the government, and seemed to be supported by arguments of expediency. The existence of a church, with the gradation and subordination of governors and governed, called for a set of regulations for the direction and order of its various functions. This was admitted; and under that notion a body of canonical

(*a*) Duck de aut. 299. (*b*) Ibid. 307. (*c*) Giann. Hist. Nap. lib. 11. ca. 2. vol. 2. p. 119.

jurisprudence had been suffered to grow up for a long course of years. In a national synod held A. D. 670, the *codex canonum vetus ecclesiæ Romanæ* was received by the clergy (a). It appears also by the before-mentioned charter to the bishop of Lincoln, that (b) William the Conqueror, with the advice and assent of his great council, had reviewed and reformed the episcopal laws that were in use till his time in England. It is beyond dispute that a canon law of some kind had been long established here by the sanction of the legislature; as may be seen in Mr. Lambard's Collection of Saxon Constitutions (c). These ancient canons were probably not so prejudicial to the rights of the sovereign and the state; for which reason, as well as on account of the appearance they bore of municipal regulations, made at home for the government of the church, they had never excited any complaint or jealousy.

But a compilation of canon law was made by *Ivo de Chartres*, in the time of Henry I. containing many extravagant opinions, calculated to advance the dominion of the pope, and the pretensions of the clergy. After this, and about fourteen years after the discovery of the Pandects, in the year 1151, a more complete collection of canon law was made by *Gratian*, a Benedictine Monk of Bologna, and was published under the title of *Decretum*: it was made in imitation of the Pandects, and was a *digest* of the whole *pontifical* canon law. This is a collection of opinions and decisions, extracted from sayings of the fathers, canons of councils, and, above all, from decretal epistles of popes; all tending to exalt the clerical state, and to exempt the clergy from secular subordination. The applause this book received from the see of Rome and the clergy, raised it soon above all former collections; and it became the grand code of ecclesiastical law, upon which the popish hierarchy rested all its hopes and pretensions.

(a) Seld. Notes to Eadm.

(b) Wilk. Leg. Ang. Sax. p. 292.

(c) Duck de aut. 98.

The canon and civil law had before been studied and professed by the same persons; and the union of these two laws was now drawn closer. The canon law was from the beginning under great obligations to the civil; the very form in which it now appeared was evidently borrowed from thence; and whatever was most excellent in it, was acknowledged to be copied from that model. These two systems now became so connected, and in so near a degree of relation, that a learned writer says, the one could not subsist without the other. They afforded each other a mutual support; they had the same professors; and it was requisite to the fame and preferment of a churchman, that he should be both a civilian and a canonist.

When these two laws were brought into this high repute, *Vacarius* came into England, and, A. D. 1149, towards the end of Stephen's reign began to read lectures, at Oxford, on the canon and civil law. Upon this an alarm was raised, and the king, apprehensive of the consequences to which these new doctrines might lead, in the year 1152, or thereabouts, is said to have forbid the reading of books of the canon law (a); a prohibition that could not be meant to extend to that canon law which had long been admitted and ratified, but probably only to the novel and bold opinions contained in the collection of *Ivo de Chartres*, and more particularly in that lately made by *Gratian*.

Indeed the use of the canon law became now a subject of very serious consideration. The canons before admitted here were very ancient; many of them had received a legislative sanction, and by long continuance they had ingrafted themselves into the constitution of the country; but a set of opinions entirely new was advanced by the publication of the *Decretum*, which, from the parade of the work and the support it received from the see of Rome, had the appearance of a promulgation of laws imposed on the chris-

(a) Joh. Salisb. de nug. curia.

tian world by the sole and supreme authority of the pope. From a question on the *utility*, as it had been before in some respects, it became now a question upon the *authority* of these laws (a). The contest between the secular and ecclesiastical state was thenceforward more violent, as the points upon which it arose were more important.

Notwithstanding the prohibition of king Stephen, the study of the civil and canon law was universally promoted by the clergy. Educated in opinions calculated to promote the benefit and emolument of their own order, it was not much to be wondered, that they struck in with the designs of the pope, and stood firmly upon the maintenance of their own pretended rights and privileges.

The active spirit of the clergy did not want instruments to work with: the body of canon law lately published by *Gratian* furnished authority and arguments for every species of usurpation.

The doctrines of the canon law, as delivered in the *Decretum*, tended to mark more strongly the distinction between clergy and laity, and the great deference due to the former. It is there laid down, that a custom against the decree of a pope is void; and that all men must observe the pope's command. It is made an anathema to sue a clergyman before a lay judge; if a lay judge condemn or destroy a clerk, he is to be excommunicated; a clerk may implead a layman before what judge he pleases; judges who compel a clerk to answer to a suit before them, shall be excommunicated; a layman cannot give evidence against a clerk; with numberless extravagancies of the same kind. Such notions did the canonists propagate for law respecting churchmen, in the reigns of Henry II. of Richard, and of John.

Indeed it was not till these doctrines had generally prevailed, that the separate establishment of ecclesiastical judicature gained much strength. It was not till the publi-

(a) Litt. Hen. II. vol. 2. 471.

cation of the *Decretum*, and the growing authority of the canons had given some order, consistence, and stability to spiritual government, that the exclusive jurisdiction of these courts was an object of very important consideration, or that their claims were urged to any great extent.

Some causes, apparently clerical, had continued to hang about the temporal courts, particularly those concerning tithes; which, being the issues of freehold property, and so partaking of its nature, could hardly be considered as merely spiritual(*a*). Accordingly such pleas were held both in the ecclesiastical and temporal courts till the time of Henry II. After that, tithes came under the notice of our courts of common law only in an indirect proceeding; such as on prohibitions, writs of right of advowson, or by *scire facias*(*b*), an ancient proceeding since abolished by parliament(*c*). The prerogatives of the hierarchy, and the jurisdiction of the ecclesiastical courts assisted each other in extending their influence. The courts grew in authority, and the bishops rose in their pretensions.

Amongst other attempts to aggrandise themselves, the clergy did not omit so valuable a subject of acquisition as benefices. A benefice, being an eleemosynary provision for a person who officiated in the discharge of religious duties, was originally in the sole disposal of the founder, and was conferred, like other donations, by investiture; but the bishops, as having the superintendence over spiritual things, claimed a right of controul over these gifts. This occasioned a contest between patrons and the bishops for many years; till at length the ancient way of investiture entirely ceased about the reigns of king Richard and John, and lay-patrons became obliged first to present their clerks to the bishop, who, according to his discretion, gave them institution(*d*). A like method of filling vacant bishoprics was claimed by the pope; but the spirited resistance of some

(*a*) Selden's Tithes, 387. (*b*) Ibid. 422. (*c*) By Stat. E. l. III.

(*d*) Selden's Tythes, 383.

of our kings defeated all his attempts; though, as usual, he never receded from the pretended right.

The appointment, however, to bishoprics, was, to a degree, put under the controul of the pope. In the time of Henry I. a bishop elect was to receive *investiture* of his temporalities from the king, of whom all bishops held their lands as baronies. This was performed by the king's delivering to the bishop a ring and crosier, as symbols of his spiritual marriage to the church and of his pastoral office; and hence called investiture *per annulum et baculum*: after this the bishop used to do *homage* to the king, as to his liege lord. But that king finding it expedient to give way to the demands of the pope, resigned this power and ceremony of investiture, and only required that bishops should do homage for their temporalities: and king John, to obtain the protection of the pope, was contented to give up, by charter, to all monasteries and cathedrals, the free right of electing their prelates, whether abbots or bishops. He reserved only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to proceed to election (since called a *congé d'élire*), on refusal whereof the electors might make their election without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expressly recognised and confirmed by king John's *Magna Charta*; was again established by stat. 25 Ed. III. st. 6. c. 3.; and continued the law and practice till the time of Henry VIII.

To return to the progress of ecclesiastical judicature. There were two subjects of jurisdiction which the spiritual court gradually drew to itself and endeavoured to appropriate: these were *marriages* and *wills*; which latter led to the cognizance of *legacies*, and the disposal of *intestates' effects*.

Marriage, being a contract dictated and sanctioned by the law of nature, and entitling the parties to certain civil rights, seems to have nothing in it of spiritual cog-

nizance; but the church of Rome having converted it into a sacrament, it became entirely a spiritual contract, and as such fell naturally within the ecclesiastical jurisdiction, very soon after its separation from the secular court; it followed almost of consequence, that the spiritual court should likewise determine questions of *legitimacy* and *bastardy*.

Probate of wills. Cases of wills and intestacy, as they were, in their nature, less allied to the spiritual function, did not intirely submit to the ecclesiastical jurisdiction. It appears from Glanville, that in the reign of Henry II. the jurisdiction of personal legacies was in the temporal courts (a). But notwithstanding this, if there was a question in the temporal court, whether a testament was a true one or not; whether it was duly made, or whether the thing demanded was really bequeathed; such plea was to be heard and determined by the court christian; because, says our author, *all pleas upon testaments are properly cognisable before the ecclesiastical judge* (b). Thus, the validity of a testament, or the bequest of a legacy, was to be certified by the spiritual court: nevertheless, as in cases of *bastardy* the court christian did nothing more than answer the mere question, whether bastard or not, and the consequence of *descent* and title was left to be determined at common law; so were the consequences of a testament, as the recovery and payment of legacies, to be heard and determined in the temporal courts.

By the manner in which Glanville speaks of the *probate* of wills, it seems as if that course of authenticating wills had been long in use. The beginning, or steps, by which this innovation established itself, it is not easy to trace: it lies buried in that obscurity which involves not only the origin of our municipal customs, but the incroachments gradually made upon them by the civil and canon law.

When the ecclesiastical court had once the probate of wills, it appeared no very great enlargement of jurisdiction

(a) Lib. 7. c. 6, 7.

(b) Ibid.

to add the power of enforcing the execution of them, in payment of legacies. But there are no testimonies of those times that warrant us to conclude, that this had generally obtained before the reign of Henry III. (a).

It seems doubtful, whether the mode used by the Saxons for the distribution of the estates of *intestates* continued during the whole of this period. A law of Henry I. says, that upon a person dying intestate, those who were intitled to succeed should divide his effects *pro animâ ejus*. This is the first mention in our law of a disposition of an intestate's effects for the benefit of his soul; but there is no mention of the controul or intermeddling of the bishop, either in this law, or, even later than this, in Glanville; although he expressly mentions the jurisdiction of the church as to testaments.

In king John's charter it was expressly provided, that if any freeman died intestate, his chattels should be disposed of by the hands of his next of kin, *per visum ecclesiæ*, by the advice and direction of the ordinary, saving to all creditors their debts. This clause, it is said, was word for word in the charter 9 Hen. III. and is to be seen in several manuscripts of it (b); but being left out of the exemplification of this charter on the roll 25 Ed. I. from which is copied the *Magna Charta* in our statute books, it is not now found there. The provision was probably inserted by the contrivance of the bishops, who, with Pandolfo the pope's nuncio, were with John at Runnymede. There was not wanting colour for a provision like this; for as the statute of Henry I. before alluded to, had expressly said, that the distribution was to be *pro animâ intestati*, the bishops seemed, by their holy function, to be best qualified to see this office performed with fidelity. Hence it was, that, in after-times, this power was delegated by the ordinary to the next of kin, in letters or otherwise; an autho-

(a) Seld. Works, vol. 3. 1672.

(b) Ibid. 1676.

rity grounded upon these words of the charter, *per visum ecclesiæ*(a); though there are no documents that assure us this law was put in force during the reign of king John.

In the reign of Stephen the clergy began to draw into the spiritual court the trial of persons *pro læsione fidei*, that is, for breach of faith in civil contracts. By means of this they took cognizance of many matters of contract which belonged properly to the temporal court. This was the boldest stretch which that tribunal ever made to extend its authority, and would, in time, have drawn within its jurisdiction most of the transactions of mankind. The pretence on which they founded this claim was probably this: that oaths and faith solemnly plighted being of a religious nature, the breach of them more properly belonged to the spiritual than to the lay tribunal.

The circumstances of the times tended very much to encourage the clergy in their scheme of opposition to the secular power. The provision for the clergy was in those days very precarious, and left them at the mercy of their patrons. Being, in general, from their function, considered as a sacred body of people, when oppressed and ill-treated by potent lords, they drew the compassion of many, and particularly the support of their bishops; who, in their turn, receiving as little favour from kings, were continually increasing their store of merit with the sovereign pontiff by the many struggles they engaged in on their own account, and on account of their inferior brethren. The pope, no ungrateful sovereign, always distinguished his zeal in supporting his bishops, as they did in supporting the lower clergy; till the several orders of ecclesiastics, united in a common cause, and sharpened against the laity by long contention, encouraged each other, by every motive of defence and aggrandizement, to contribute in their stations to promote the power of the church. The pope having made

(a) Seld. Works, vol. 3. 1679.

use of the bishops to gain and govern the clergy, united all their powers to establish a dominion over the laity; and no occasion was let pass in which any of them could snatch an advantage.

Henry I. being seated on the throne by a doubtful title, thought it prudent to gain the clerical part of his subjects by some concessions. Stephen, who owed his authority entirely to them, went further. By these means they acquired such confirmed strength and habitual reverence from the people, that, notwithstanding all the power of Henry II. and the spirit with which he asserted his sovereignty and independence, the contest he had with Becket tended to an issue directly contrary to that which he had promised himself; so that, after some concessions and connivance, to which he submitted in fits of repentance, his reign ended in a firm establishment of the clergy in most of their extraordinary claims of privilege and jurisdiction.

The contest that Henry II. had with Becket concerning the limits of ecclesiastical power, fills up a great part of that king's reign. To give weight to his side of the contest, and, instead of debating, to effect a clear decision, Henry procured an act of the legislature formally enacting the principal points of controversy for which he contended. This was the famous *Constitutions of Clarendon*.

At a great council held at Clarendon, A. D. ^{Constitutions} 1164, in the 10th year of his reign, a code of ^{of Clarendon.} laws was brought forward by the king, under the title of *the ancient customs of the realm*; and as Becket had solemnly promised he would observe what were really such, the king procured the principal propositions in dispute to be enacted, and declared by the council under that denomination. Nothing will enable us to judge so well of the pretensions of the clergy, as a perusal of these *Constitutions*; they shall therefore be stated at length. They are contained in sixteen articles; ten of which were considered by the see of Rome as so hostile to the rights of the clergy, that pope Alexander in full consistory passed a

solemn condemnation on them; the other six he *tolerated, not as good, but less evil*. These six articles were the 2d, 6th, 11th, 13th, 14th, and 16th.

The 2d, Churches belonging to the see of our lord the king cannot be given away in perpetuity, without the consent and grant of the king. 6th, Laymen ought not to be accused, unless by certain and legal accusors and witnesses, in presence of the bishop, so as that the archdeacon may not lose his right, nor any thing which should thereby accrue to him; and if the offending persons be such as none will or dare accuse them, the sheriff, being thereto required by the bishop, shall swear twelve lawful men of the vicinage or town before the bishop, to declare the truth according to their conscience. 11th, Archbishops, bishops, and all dignified clergymen (*a*), who hold of the king and chief, have their possessions from the king as a barony, and answer thereupon to the king's justices and officers, and follow and perform all royal customs and rights, and, like other barons, ought to be present at the trials of the king's court, with the barons, till the judgment proceeds to loss of members, or death. 13th, If any nobleman of the realm shall forcibly resist the archbishop, bishop, or archdeacon, in doing justice upon him or his, the king ought to bring them to justice; and if any shall forcibly resist the king in his judicature, the archbishops, bishops, and archdeacons, ought to bring him to justice, that he may make satisfaction to our lord the king. 14th, The chattels of those who are under forfeiture to the king, ought not to be detained in any church or church-yard against the king's justice, because they belong to the king, whether they are found within churches, or without. 16th, The sons of villains ought not to be ordained without the consent of their lords, in whose lands they are known to have been born.

Thus was the pope pleased to tolerate such of these articles as either did not at all affect the clerical state, or rather

(a) So *universæ personæ* is construed by Lord Littelton in his Hen. II. vol. 4. 370.

contributed to aid and support it; and were thrown in, probably, to qualify and temper those which were evidently hostile to the ecclesiastical sovereignty. The ten which were condemned by the pope, were as follow.

The 1st, If any dispute shall arise concerning the advowson and presentation of churches between laymen, or between ecclesiastics and laymen, or between ecclesiastics, let it be tried and determined in the court of our lord the king. 3d, Ecclesiastics charged and accused of any matter, and being summoned by the king's justice, shall come into his court to answer there concerning that which it shall appear to the king's court is cognizable there; and shall answer in the ecclesiastical court concerning that which it shall appear is cognizable there; so that the king's justice shall send to the court of holy church, to see in what manner the cause shall be tried there; and if an ecclesiastic shall be convicted, or confess his crime, the church ought not any longer to give him protection. 4th, It is unlawful for archbishops, bishops, or any dignified clergymen of the realm, to go out of the realm without the king's licence; and if they go, they shall, if it so please the king, give security that they will not, either in going, staying, or returning, procure any evil or damage to the king, or kingdom. 5th, Persons excommunicated ought not to give any security by way of deposit, nor take any oath, but only find gage and pledge to stand to the judgment of the church, in order to absolution. 7th, No tenant *in capite* of the king, nor any of the officers of his household, or of his demesne, shall be excommunicated; nor shall the lands of any of them be put under an interdict, unless application shall first have been made to our lord the king, if he be in the kingdom, and if not, to his justice, that he may do right concerning such person; and in such manner, as that which shall belong to the king's court shall be there determined, and what shall belong to the ecclesiastical court shall be sent thither to be there determined. 8th, Concerning ap-

peals, if any shall arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop: and if the archbishop shall fail in doing justice, the cause shall at last be brought to our lord the king, that, by his precept, the dispute may be determined in the archbishop's court; so that it ought not to proceed any further without the king's consent. 9th, If there shall arise any dispute between an ecclesiastic and a layman, or between a layman and an ecclesiastic, about any tenement which the ecclesiastic pretends to hold *in eleemosynâ*, and the layman pretends to be a lay fee, it shall be determined by the judgment of the king's chief justice, upon a recognition of twelve lawful men, *utrûm tenementum sit pertinens ad eleemosynam, sive ad fœdum laicum*. And if it be found to be *in eleemosynâ*, then it shall be pleaded in the ecclesiastical court; but if a lay fee, then in the king's court, unless both parties claim to hold of the same bishop or baron: and if they do, then the plea shall be in his court; provided, that by such recognition, the party who was first seised shall not lose his seisin till the plea has been finally determined. 10th, Whosoever is of any city, or castle, or borough, or demesne manor of our lord the king, if he shall be cited by the archdeacon or bishop for any offence, and shall refuse to answer to such citation, may be put under an interdict; but he ought not to be excommunicated till the king's chief officer of the town be applied to, that he may, by due course of law, compel him to answer accordingly; and if the king's officer shall fail therein, such officer shall be *in misericordiâ regis*; and then the bishop may compel the person accused by ecclesiastical justice. 12th, Pleas of debt, *quæ fide interpositâ debentur, vel absque interpositione fidei*, whether due by faith solemnly pledged, or without faith so pledged, belong to the king's judicature. 15th, When an archbishopric, or bishopric, or abbey, or priory of royal foundation, shall be vacant, it ought to be in the hands of the king,

and he shall receive all the rents and issues thereof, as of his demesne. And when such church is to be filled, the king ought to send for the principal clergy thereof, and the election ought to be made in the king's chapel, with the king's assent, and the advice of such of the prelates of the kingdom as he shall call for that purpose (a); and the person elect shall there do homage and fealty to the king as his liege lord, of life, limb, and worldly honour (saving his order), before he be consecrated (b).

These Constitutions were calculated to give a rational limitation to the secular and ecclesiastical judicature; and furnished a basis on which these separate jurisdictions might have been founded, without any inconvenience to the nation, or diminution of the temporal authority; and they were with that view confirmed, A. D. 1176, at a council held at Northampton. But the king, overcome with shame for the murder of Becket, with which he was charged, and struck with a panic of superstition, gave way to the torrent, and endeavoured to reconcile himself to the holy see by an ample concurrence with all its demands; at least he desisted from executing those laws for which he had so many years been contending. It appears, moreover, from a letter which he sent to the pope by the hand of *Hugo Petrileo*, the legate, that, *notwithstanding the opposition of the greatest and wisest men in his kingdom*, he had, at the intercession of the legate, and out of reverence and devotion to the see of Rome, made the following concessions. That no clerk should, for the future, be brought personally before a secular judge for any crime or transgression (c) whatsoever, except only for offences against the forest laws, or in case

(a) *Debet fieri electio assensu domini regis, et consilio personarum regni quas ad hoc faciendum vocaverit.*

(b) Vid. Wilk. Ang. Sax. Leg. p. 321. and also in Litt. Hen. II. vol. 4. 414. a copy of these Constitutions from the Cottonian manuscript of Becket's Life and Epistles, which is probably the most ancient and correct copy of them.

(c) *De aliquo foris-facto.*

of a lay fee for which lay service was due to the king, or to some other secular person. He promised, that any person convicted, or making confession before his justice, in the presence of the bishop, or his official, of having knowingly and premeditatedly killed a clerk, should, besides the usual punishment for killing a lay man, forfeit all his land of inheritance for ever (*a*). He also promised, that clerks should not be compelled to submit to the trial by duel; and moreover, he promised not to retain in his hands vacant bishoprics or abbeys beyond the term of one year, unless from urgent necessity, and evident cause of delay, not falsely pretended (*b*). It is said (*c*), that Henry, by charter, granted to the clergy the cognizance of causes matrimonial; but neither this nor any other of the foregoing concessions were enacted by authority of parliament, during any part of this king's reign; nor did he himself observe them, except in not compelling criminal clerks to appear before a lay judge, as before stipulated, and in exempting them in all cases from the trial by duel. The statutes of Clarendon concerning ecclesiastical matters subsisted unrepealed and confirmed; but were suspended in part by a temporary connivance of the executive power (*d*).

The establishment which the clergy gained in this reign was not weakened in those of his successors. Richard I. was redeemed from his captivity by the aid of his subjects; among whom the zeal of the ecclesiastics, who readily converted their plate and other valuables to the ransom of their king, was particularly distinguished. This gave them every thing to hope from the king's gratitude; nor were they disappointed in their expectations. The feudal subjection under which John laid his kingdom to the pope,

(*a*) What extraordinary penalty was this, when laymen, at that time, forfeited their lands in cases of felony?

(*b*) Wilk. Leg. Ang. Sax. p. 331. Litt. Hist. Hen. II. vol. 4. 265. 296.

(*c*) Sir Roger Owen MSS. p. 397.

d) Sir Roger Owen, says the king, obtained a parliamentary repeal of the Constitutions of Clarendon. MSS. p. 404.

ratified every clerical innovation, and seemed to justify the distinctions before claimed by the churchmen.

In this manner did the influence of the civil and canon law gradually increase; but these laws were not confined to the ecclesiastical courts, where they were professedly the only rules of decision: they, by degrees, interwove themselves into the municipal law, and furnished it with helps towards improving its native stock. The law of personal property was in a great measure borrowed from the imperial, and the rules of the descent of lands wholly from the canon law: to these might be added many other instances of imitation, too long to be enumerated in the present work.

These two laws, as the Norman had before, obtained here by sufferance and long usage. Such parts of them as were fitting and expedient, were quietly permitted to grow into practice; while such as were of an extravagant kind occasioned clamour, were called usurpations, and, as such, were strongly opposed. What was suffered to establish itself, either in the clerical courts, or by mingling with the secular customs, became so far part of the common law of the realm, equally with the Norman; for though of later birth, it had gained its authority by the same title, a length of immemorial prescription (*a*).

(*a*) This is all that I thought necessary to state concerning the prevalence of the civil and canon law, and the influence they both had upon the common custom of the realm; and I have heard no complaint, as in the case of feuds, that this part of the work is at all defective: indeed, I should not wonder, if some thought even this short sketch too prolix; so much are our studies and opinions directed by fashion. But it seems to me, if the illustration of our ancient law had been the sole object of attention, and not a prepossession in favour of a topic that happened to be in vogue, that the same censure would be at least as applicable in one as in the other case.

A comparison of our law with those two systems of jurisprudence, would, in my mind, be an enquiry of equal curiosity, and much more to the purpose of a history of the English law, than the same process when applied to the so-much-admired systems of foreign feuds. This is sufficiently evinced by the cursory remarks already made respecting these two laws. It further appears by the works of Glanville, Bracton, and other old authors, who certainly wrote the law of their time, and not their own inventions, as has been too often and too inconsiderately said; and it is confirmed by marks of conformity, or imitation, in instances where no suspicion of fabrication was ever entertained.

Of trial by
duel in civil
questions.

It had been a very ancient custom among the Normans, both in their own country and in France, to try titles to land, and other questions, by *duel*. When William had ordained that this martial practice of his own country should be observed here in criminal trials, it became very easy to introduce it into civil ones; and being only used in the *curia regis*, it had not, among the other novelties of that court, as it certainly would have had in the county court, or any other of the ancient tribunals of Saxon original, the appearance of so singular an innovation.

With all its absurdity, this mode of trial was not without some marks of a rational reliance on testimony, and vouchers for the truth of what was in dispute; for it was never awarded without the oath of a credible witness, who would venture his life in the duel for the truth of what he swore. "I am ready," says the party litigant, "to prove it by my freeman John, whom his father on his death-bed enjoined, by the duty he owed him, that if at any time he should hear of a suit for this land, he should hazard himself in a *duel* for it, as for that which

The civil and canon law seem in a particular manner to be objects of curiosity to an English lawyer; they have long been domesticated in this country; were taught at our universities as a part of a learned education, and the road to academic honours; they have entered into competition with the common law; and, though unsuccessful in the struggle, were still thought worthy to be retained in our ecclesiastical courts, and there became the model by which our national canons and provincial constitutions were framed. These two laws, therefore, stand in a much nearer relation to the common law, than the feudal law of Lombardy, or of any foreign country; none of which can boast any pretensions equal to those abovementioned.

Notwithstanding this close affinity between the civil and canon law and our own, I thought, that to enter into a particular comparison of such parts of those laws as seemed more remarkably to relate to the common law, was an enquiry not strictly within the compass of the present History; and therefore I declined it, for reasons similar to those I have before given with regard to foreign feuds.

I cannot, however, leave this subject without expressing a wish, that the early connexion of our law with the civil and canon law was more fully investigated than it has yet been. The history and present state of those two laws in this country, and of our own national canon law, seems also to have been not yet sufficiently developed. To this it may be answered, that there is at least as great want of curiosity upon this topic, as of information; and I am sure I do not pretend to determine which of these is the cause, and which the effect, of the other.

“his father had *seen and heard* (a).” Thus the champion of the demandant was such a one as might be a fit witness; and on that account the demandant could never engage in the combat himself: but the other party, who was defendant, or tenant, in the suit, might engage either in his own person, or by that of another.

It is difficult to say what matters were, at one time, submitted to this mode of trial. Perhaps at first all questions of fact might, at the option of the demandant, have been tried by duel. In the reign of Henry II. it was decisive in pleas concerning freehold; in writs of right; in warranty of land, or of goods sold; debts upon mortgage or promise; sureties denying their suretyship; the validity of charters; the manumission of a villain; questions concerning services: all these might have been tried by duel (b).

Notwithstanding the general bent of this people to admit the propriety of a trial so suitable to their martial genius, there must have been men of gravity and learning amongst them at all times; and persons of that character would always reprobate so ineffectual and cruel a proceeding. Considerations of this kind at last effected a change.

We find in the reign of Henry II. that many questions of fact relating to property, were tried by twelve *liberos et legales homines juratos*, sworn to speak the truth; who were summoned by the sheriff for that purpose. This tribunal was, in some cases, called *assisa*, from *assidere*, as it is said, because they sat together; though it is most probable, and indeed seems intimated by the manner in which Glanville often expresses himself, that it was emphatically so called from the *assisa*, (as laws were then termed, by which the application of this trial was, in many

(a) Ariosto, in the true spirit of the old jurisprudence, as well as of chivalry, makes Rinaldo refer to the proof by arms, as equal to if not stronger than that by testimony.

Col testimonio, io vo', che l'arme sieno:

Che ora, e in ogni tempo, che ti piace,

Te n'abbiano a far prova piu verace.

Orl. Fur. cant. 31. stanz. 102.

(b) Glanv. passim.

instances, ordained. On other occasions this trial was called *jurata*, from the *juratos*, or *juratores*, who composed it. Of the origin of this trial by twelve jurors, and the introduction of it into this country, we shall next enquire.

The trial *per duodecim juratos*, called *nambda*, had obtained among the *Scandinavians* at a very early period; but having gone into disuse, was revived, and more firmly established, by a law of *Reignerus*, surnamed *Lodbrog*, about the year A. D. 820 (a). It was about seventy years after this law, that *Rollo* led his people into *Normandy*, and, among other customs, carried with him this method of trial; it was used there in all causes that were of small importance. When the Normans had transplanted themselves into England, they were desirous of legitimating this, as they did other parts of their jurisprudence; and they endeavoured to substitute it in the place of the Saxon *sectatores*, to which tribunal it bore some shew of affinity.

The earliest mention we find of any thing like a *jury*, was in the reign of William the Conqueror, in a cause upon a question of land, where *Gundulph*, bishop of *Rochester*, was a party. The king had referred it to the county, that is, to the *sectatores*, to determine in their county court, as the course then was, according to the Saxon establishment; and the *sectatores* gave their opinion of the matter. But *Odo*, bishop of *Bayeux*, who presided at the hearing of the cause, not satisfied with their determination, directed, that if they were still confident that they spoke truth, and persisted in the same opinion, they should chuse *twelve* from among themselves, who should confirm it upon their *oaths* (b). It seems as if the bishop had here taken a step which was not in the usual way of proceeding, but which he ventured upon in conformity with the practice of his own country; the general law of England being, that a judicial enquiry concerning a fact should be collected *per omnes comitatūs probos homines*.

(a) Hick. Thes. Diss. Epist. 38, 39, 40.
Hickes, ut sup.

(b) Text. Roff. apud

Thus it appears, that in a cause where this same *Odo* was one party, and archbishop *Lanfranc* the other, the king directed *TOTUM comitatum considerare*; that all men of the county, as well French as English, (particularly the latter) that were learned in the law and custom of the realm, should be convened: upon which they all met at *Pinendena*, and there it was determined *AB OMNIBUS illis probis*, and agreed and adjudged *à toto comitatu*. In the reign of William Rufus, in a cause between the monastery of *Croyland* and *Evan Talbois*, in the county court, there is no mention of a jury; and so late as the reign of *Stephen*, in a cause between the monks of Christ-Church, Canterbury, and *Radulph Picot*, it appears from the acts of the court (a), that it was determined *per judicium TOTIUS COMITATUS* (b).

This trial by an indefinite number of *sectatores* or *suitors* of court continued for many years after the Conquest: these are the persons meant by the terms *pares curiæ*, and *judicium parium*, so often found in writings of this period. Successive attempts gradually introduced jurors to the exclusion of the *sectatores*; and a variety of practice, no doubt, prevailed till the Norman law was thoroughly established (c). It was not till the reign of Henry II. that the trial by jurors became general; and by that time, the king's itinerant courts, in which there were no *pares curiæ*, had attracted so many of the country causes, that the *sectatores* were rarely called into action (d).

The sudden progress then made in bringing Of trial by the this trial into common use, must be attributed assize. to the law enacted by that king. As this law has not come down to us, we are ignorant at what part of his reign it was passed, and what was the precise extent of its regulation: we can only collect such intimation as is given us by co-

(a) Bib. Cott. Faustina, A. 3. 11. 31. (b) Hickes Thes. Diss. Ep. 36.

(c) The following law of Henry I. seems to be in support of the ancient usage. *Unusquisq; PER PARES SUOS judicandus est, et ejusdem provinciæ; PEREGRINA vero judicia modis omnibus submovemus.* Leg. 31.

(d) Persons of a new character, under the name of *secta*, and *sectatores*, in a subsequent period, made a necessary part of most actions brought in the king's courts, as will be seen hereafter.

temporary authorities, the chief of which is Glanville, who makes frequent allusion to it. It is called by him *assisa*, as all laws then were, and *regalis constitutio*; at other times, *regale quoddam beneficium, clementiâ principis de concilio procerum populis indultum*. It seems as if this law ordained, that all questions of *seisin* of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth; and also that in questions of *right* to land, the tenant might elect to have the matter tried by twelve good and lawful knights instead of the duel. It appears that some incidental points in a cause, that were neither questions of mere *right*, nor of *seisin* of land, were tried by a recognition of twelve men; and we find that in all these cases, the proceeding was called *per assisam*, and *per recognitionem*; and the persons composing it were called *juratores, jurati, recognitores assisæ*; and collectively *assisa*, and *recognitio*: only the twelve jurors in questions of right were distinguished with the appellation of *magna assisa*; probably because they were *knights*, and were brought together also with more ceremony, being not summoned immediately by the sheriff, as the others were, but elected by four knights, who for that purpose had been before summoned by the sheriff. We are also told, that the law by which these proceedings were directed, had ordained a very heavy penalty on *jurors* who were convicted of having sworn falsely in any of the above instances (a).

Thus far of one species of this trial by twelve men, which was called *assisa*. It likewise appears, that the oath of twelve jurors was resorted to in other instances than those provided for by this famous law of Henry II. and then this proceeding was said to be *per juratam patriæ*, or *vicineti*, *per inquisitionem*, *per juramentum legalium hominum*. This proceeding by jury was no other than that which we before mentioned to have gained ground by usage and custom. This was sometimes used in questions of property; but, it should seem, more frequently in matters of a criminal nature.

(a) Glan. lib. 13. c. 1. lib. 2. c. 7. 19.

The earliest mention of a trial by jury, that bears a near resemblance to that which this proceeding became in after-times, is in the Constitutions of Clarendon before spoken of. It is there directed, that, should nobody appear to accuse an offender before the archdeacon, then the sheriff, at the request of the bishop, *faciet jurare duodecim legales homines de vicineto, seu de villâ, quod inde veritatem secundum conscientiam suam manifestabunt* (a). The first notice of any *recognition*, or *assise*, is likewise in these Constitutions; where it is directed, that, should a question arise, whether land was lay or ecclesiastical property, *recognitione duodecim legalium hominum per capitalis justitiæ considerationem terminabitur, utrùm, &c.* (b); this was A. D. 1164. Again, in the statute of Northampton, A. D. 1176, (which is said to be a republication of some statutes made at Clarendon, perhaps at the same time the before-mentioned provisions were made about ecclesiastical matters) the justices are directed, in case a lord should deny to the heir the seisin of his deceased ancestor, *faciant inde fieri recognitionem per duodecim legales homines, qualem seisinam defunctus inde habuit die quâ fuit vivus et mortuus*; and also *faciant fieri recognitionem de disseisinis factis super assisam, tempore quo the king came into England, after the peace made between him and his son*. We see here, very plainly described, three of the assises of which so much will be said hereafter; the *assisa utrùm fædum sit laicum an ecclesiasticum*; the *assisa mortis antecessoris*; and the *assisa novæ disseisinæ*. Again, in the statute of Northampton there is mention of a person *rectatus de murthero per sacramentum duodecim militum de hundredo*, and *per sacramentum duodecim liberorum legalium hominum*.

Thus have we endeavoured to trace the origin and history of the trial by twelve men sworn to speak the truth, down to the time of Glanville: a further account of it we

(a) Ch. 6.

(b) Ch. 9.

shall defer, till we come to speak more minutely of the proceedings of courts at this time.

Another novelty introduced by the Normans, was the practice of making deeds with seals of wax and other ceremonies(*a*). The variety of deeds which soon after the Conquest were brought into use, and the divers ways in which they were applied for the purpose of transferring, modifying, or confirming rights, deserve a very particular notice.

Deeds or writings, from the time of the Conquest, were sometimes called *chirographa*, but more generally *chartæ*: the latter became a term of more common use, and so continued for many years; the former rather denoted a species of the *chartæ*, as will be seen presently. Charters were executed with various circumstances of solemnity, which it will be necessary to consider: these were the seal, indenting, date, attestation, and direction, or compellation.

Charters were sometimes brought into court; either the king's, or the county, hundred, or other court, or into any numerous assembly; and there the act of making, or acknowledging and perfecting the charter was performed. This accounts for the number of witnesses often found to old charters, with the very common addition of *cum multis aliis*. When charters were not executed in this public manner, they were usually attested by men of character and consequence: in the country, by gentlemen and clergymen; in cities and towns, by the mayor, bailiff, or some other civil officer(*b*).

The Anglo-Saxon practice of affixing the cross still continued; yet was not so frequent as before; but gave way to a method which more commonly obtained after the Conquest, namely, that of affixing a *seal of wax*. Seals of wax were of various colours. They were commonly round or oval, and were fixed to a label of parchment, or

(*a*) Wilk. Leg. Sax. 239.

(*b*) Mad. Form. Diss. 26.

to a silk string fastened to the fold at the bottom of the charter, or to a slip of the parchment cut from the bottom of the deed, and made pendulous.* Besides the principal seal there was sometimes a counter-seal, being the private seal of the party. If a man had not his own seal, or if his own seal was not well known, he would use that of another; and sometimes, for better security, he would use both his own and that of some other better known.

The original method of *indenting* was this. If a writing consisted of two parts, the whole tenor of it was written twice upon the same piece of parchment; and, between the contents of each part, the word *chirographum* was written in capital letters, and afterwards was cut through in the midst of those letters; so that, when the two parts were separated, one would exhibit one half of the capital letters, and one the other; and when joined, the word would appear entire. Such a charter was called *chirographum*. About the reigns of *Richard* and *John*, another fashion of cutting the word *chirographum* came into use; it was then sometimes done *indent-wise*, with an acute or sharp incision, *instar dentium*(a); and from thence such deeds were called *indenturæ*.

Charters were sometimes dated, and very commonly they had no date at all; but as they were always executed in the presence of somebody, and often in the presence of many, the names of the witnesses were inserted, and constituted a particular clause, called *his testibus*. The names of the witnesses were written by the clerk who drew the deed, and not by the witnesses themselves, who very often could not write. It seems, that wives were sometimes witnesses to deeds made by their husbands; monks and other religious persons to deeds made by their own houses; even the king is found as witness to the charters of private men(b); and in the time of *Richard* and *John*, it came in

(a) Mad. Form. Diss. 14. 28, 29.

(b) Ibid. 31.

practice for him to attest his own charters himself in the words *teste meipso* (a).

Charters were usually conceived in the stile of a letter, and, at the beginning, they had a sort of direction, or compellation. These were various. In royal charters, it was sometimes, *omnibus hominibus suis Francis & Anglis*: in private ones, sometimes, *omnibus sanctæ ecclesiæ filiis*; but more commonly, *sciant præsentēs et futuri*, or *omnibus ad quos præsentēs literæ*, &c.

Thus far of the circumstances and solemnities attending the execution of charters. Let us now consider the different kinds of them; and it will be found, that as they were called *chirographa*, or *indenturæ*, from their particular fashion, so they received other appellations expressive of their effect and design. A charter was sometimes called *conventio*, *concordia*, *finalis concordia*, and *finalis conventio*. There were also *feoffments*, *demises* for *life* and for *years*, *exchanges*, *mortgages*, *partitions*, *releases*, and *confirmations* (b).

Conventio and *concordia* had both the same meaning, and signified some agreement, according to which one of the parties conveyed or confirmed to the other any lands, or other rights.

Of all charters the most considerable was a
Of feoffment. *feoffment*. After the time of the Conquest, whenever land was to be passed in fee, it was generally done by feoffment and delivery or livery of seisin (c). This might be without deed; but the gift was usually put into writing, and such instrument was called *charta feoffamenti*. A feoffment originally meant the grant of a *feud* or *fee*; that is, a barony or knight's fee, for which certain services were due from the feoffee to the feoffor: this was the proper sense of the word: but by custom it came afterwards to signify also a grant of a free *inheritance* to a man and his

(a) Mad. Form. Diss. 32.

(b) Ibid. 3.

(c) Wilk. Leg. Sax. 289.

heirs, referring rather to the perpetuity of estate than to the feudal tenure. The words of donation were generally, *dedisse, concessisse, confirmâsse, or donâsse*, some one or other of them. It was very late, and not till the reign of Richard II. that the specific term *feoffavi* was used. These feoffments were made *pro homagio et servitio*, to hold of the feoffor and his heirs, or of the chief lord.

At this early period feoffments were very unsettled in point of form; they had not the several parts which, in after-times, they were expected regularly to contain. The words of limitation, to convey a fee, whether absolute or conditional, were divers. A limitation of the former was sometimes worded thus: to the feoffee *et suis*; or *suis post ipsum, jure hæreditario perpetuè possidendum*; or *sibi et hæredibus suis vel assignatis*: of the latter thus: *sibi et hæredibus procedentibus ex prædictâ: Richardo et uxori suæ et hæredibus suis, qui de eâdem veniunt: sibi et hæredibus, qui de illo exhibunt*: from which divers ways of limiting estates (and numberless other ways might be produced) it must be concluded, that no specific form had been agreed on as necessarily requisite to express a specific estate; but the intention of the grantor was collected, as well as could be, from the terms in which he had chosen to convey his meaning (a).

It appears, that a charter of feoffment was sometimes made by a feme covert, though generally with the consent of the husband; and a husband sometimes made a feoffment to his wife. A feoffment was sometimes expressed to be made with the assent of the feoffor's wife (b); or of such a one, heir (c) of the feoffor; or of more than one, heirs of the feoffor (d); though in such cases, the charter appears to be sealed only by the feoffor. By the assent of the wife, probably, her claim of dower was in those days held to be barred; and indeed, when such feoffment was made publicly in court, it had the notoriety of a fine; and

(a) Wilk. Leg. Sax. 5.

(b) Mad. Form. 148.

(c) Ibid. 316.

(d) Ibid. 319.

might consistently enough with modern notions, be allowed the efficacy since attributed to fines in the like cases. The assent of the heirs was, probably, where the land had descended from the ancestor of the feoffor; or whereby usage it retained the property of *boecland*, not to be aliened *extra cognationem*, without the consent of the heir, where such restriction had been imposed by the original *landboc*.

A clause of *warranty* was always inserted; which sometimes, too, had the additional sanction of an oath. The import of this warranty was, that should the feoffee be evicted of the lands given, the feoffor should recompense him with others of equal value (*a*).

A charter of feoffment was not a complete transfer of the inheritance, unless followed by *livery of seisin*. This was done in various ways; as *per fustem*, *per baculum*, *per haspam*, *per annulum*, and by other symbols, either peculiarly significant in themselves, or accommodated by use, or designation of the parties, to denote a transmutation of possession from the feoffor to the feoffee.

This was the nature of a feoffment with livery of seisin, as practised in these early times. It was the usual and most solemn way of passing inheritances in land; but yet was not of so great authority as a *fine*, which had the additional sanction of a record to preserve the memory of it.

The antiquity of *fines* has been spoken of by many writers. Some have gone so far as to assert their existence and use in the time of the Saxons (*b*). But upon a strict enquiry, it is said, there are no *fines*, properly so called, before the Conquest, though they are frequently met with (*c*) soon after that period (*d*).

We shall now consider the manner in which *fines* have been treated, or, as it is now called, *levied*. The account of *fines* given by Glanville does not enable us to fix any

(*a*) Mad. Form. 7.

(*b*) Plowd. 360.

(*c*) Mad. Form. Diss. *ibid*.

(*d*) The origin of *fines* is very fully considered by Mr. Cruise, in his valuable Essay on *Fines*, who thinks, and with great shew of reason, that *fines* were contrived in imitation of a similar judicial transaction in the civil law. Cruise's *Fines*, p. 5.

precise idea of the method of transacting them. It only appears from him, that this proceeding was a final concord made by licence of the king, or his justices (*a*), in the king's court. But the nature of a fine may be better collected from the more simple manner in which it was originally conducted.

The parties having come to an agreement concerning the matters in dispute, and having thereupon mutually sealed a *chirographum*, containing the terms of their agreement, used to come into the king's court in person, or by attorney, and there acknowledge the concord before the justices: it was thereupon, after payment of a fine, enrolled immediately, and a counterpart delivered to each of the parties (*b*). This was the most ancient way of passing a fine. In course of time, fines came to be passed with a *chirographum*, upon a *placitum* commenced by original writ, as in a writ of covenant, *warrantia chartæ*, or other writ. When the mutual sealing of a *chirographum* was entirely disused, there still remained a footstep of this ancient practice; for there continues to this day in every fine a chirograph, as it is called, which is reputed as essentially necessary to evidence that a fine has been levied.

The design of *final concords* seems to have been anciently as various as the matters of litigation or agreement among men. By fines were made grants of land in fee, releases, exchanges, partitions, or any convention relating to land, or other rights: in a word, every thing might be transacted by fine which might be done by *chirographum* (*c*).

Thus far of the two great conveyances in practice for transferring estates of inheritance, namely, *feoffments* and *fin*es. The manner in which estates for life or for years (since called demises) were made, was in the way of convention or covenant (*d*).

Two other species of conveyance then used were *confir-*

(*a*) Lib. 3. c. 1.

(*b*) Mad. Form. Diss. 14.

(*c*) Ibid. 16, 17.

(*d*) Ibid. 22.

mations and *releases*. In those unsettled times, when feoffees were frequently disseised upon some suggestion of dormant claims, charters of confirmation were in great request. Many confirmations used to be made by the feoffor to the feoffee, or to his heirs or successors. Tenants in those times hardly thought themselves safe against great lords who were their feoffors, unless they had repeated confirmations from them or their heirs. Releases were as necessary from hostile claimants, as confirmations from feoffors. The words of *confirmation* were *dedi, concessi, or confirmavi*; and such deeds are distinguishable from original feoffments, only by some expressions referring to a former feoffment. *Releases* are known by the words *quietum clamavi, remisi, relaxavi*, and the like.

During the time which had elapsed since the Conquest, the Norman law had sufficient opportunity to mix with all parts of our Saxon customs. This change was not confined to the article of tenures, duel, juries, and conveyances. The manner in which justice was administered makes a distinguished part of the new jurisprudence. In the Saxon times, all suits were commenced by the simple act of the plaintiff lodging his complaint with the officer of the court where the cause was to be heard; and this still continued in the county and other inferior courts of the old constitution. But when it had become usual to re-

Of writs. move suits out of these inferior courts, or of beginning them more frequently in the king's court; it became necessary to agree upon some settled forms of precepts applicable to the purpose of compelling defendants to answer the charge alleged by plaintiffs. Such a precept was called *breve*; probably, because it contained *briefly* an intimation of the cause of complaint. It was directed to the sheriff of the county where the defendant lived, commanding that he should summon the party to appear in some particular court of the king, there to answer the plaintiff's demand, or to do some other thing tending to satisfy the ends of justice.

The necessity of such *brevia* was very obvious; for though, while most suits were transacted in the county court, it was sufficient to enter a plaint with the officer of the court; and the process issuing thereupon being to be executed by the sheriff, who was present, or supposed to be present, in court as judge, was not likely to be extremely illegal or irregular, even when warranted perhaps by nothing more authentic than verbal directions; yet, when suits were commenced in the king's court, at a great distance from the habitation of the parties, and process was to issue to him merely as an officer, who knew nothing more of the matter than what the precept explained, it was necessary that something more particular should be exhibited to him; and therefore, that the precept should be *written*. Hence perhaps it is, that the *breve* was called also a *writ* (a).

These *writs* were of different kinds, and received different appellations, according to the object or occasion of them. The distinction between writs furnished a source of curious learning, which led to many of the refinements afterwards introduced into the law. The assigning of a writ of a particular frame and scope to each particular cause of action; the appropriating process of one kind to one action, and of a different kind to another; these and the like distinctions rendered proceedings very nice and complex, and made the conduct of an action a matter of considerable difficulty.

The cultivation of this kind of learning was encouraged by a regulation of the new law, ^{Of records.} which was designed for the more useful purpose of preserving the judgments and opinions of judges for the instruction of succeeding ages: this was the practice of entering proceedings of courts upon a roll of parchment, which was then called a *record*.

The practice of registering upon *rotuli*, or rolls of parchment, was entirely Norman; nor did it obtain to any great

(a) We have before seen that deeds, among the Saxons, were called *Gewrite*. Vid. ant. p. 10.

extent till long after the Conquest. Among the Saxons, the manner of registering was by writing on both sides of the leaf; and this was either in some *evangelisterium*, or other monastic book, belonging to a religious house. It was thus, that the memory not only of pleas in courts, but of purchases of land, testaments, and of other public acts, was preserved. This practice, like other Saxon usages, continued long after the invasion of William. We find that Domesday, the most important record of the Exchequer in those times, consists of two large books. But in the time of Henry I. we find *rotuli annales* in the Exchequer for recording articles of charge and discharge, and other matters of accompt relating to the king's revenue. It is conjectured that the making inrolment of judicial matters in the *curia regis* was posterior in point of time to the same practice in matters of revenue; and was dictated by the experience of its utility in that important department (*a*). This innovation gave rise to the distinction between *courts of record*, and courts not of record.

A record begun with the entry of the original writ; rehearsed the statement of the demand, the answer or *plea*, the judgment of the court, and execution awarded. Thus a record contained a short history of an action through all its stages. When proceedings were entered in this solemn manner, and submitted to the criticism and exception of the adverse party, it became very material to each that his part of the record should be drawn with all accuracy and precision. When this attention was observed in completing a record, it became a very authentic guide in similar cases. Records were in high estimation; and, as they continued the memorials of judicial opinions, tended to fix the rules and doctrines of our law upon the firm basis of precedent and authority.

Such were the more conspicuous parts of the juridical system introduced by the Normans, and such were the changes they underwent during the period that elapsed before the end of the reign of king John.

(*a*) See Ayloffe's Ancient Charters, Introd.

CHAP. III.

WILLIAM THE CONQUEROR TO JOHN.

Of Villains—Dower—Alienation—“ Nemo potest esse Hæres et Dominus”—Of Descent—Of Testaments—Of Wardship—Marriage—Of Bastardy—Usurers—Of Escheat—Maritagium—Homage—Relief—Aids—Administration of Justice—A Writ of Right—Essoins—Of Summons—Of Attachment—Counting upon the Writ—The Duel—The Assise—Vouching to Warranty—Writ of Right of Advowson—Of Prohibition to the Ecclesiastical Court—The Writ de Nativis—Writ of Right of Dower—Dower unde Nihil.

IN the former chapter it was endeavoured to trace the history of the principal changes made in the law from the time of William the Conqueror down to the reign of king John; but the object of this work being to give a correct idea of the origin and progress of our whole judicial polity, something more satisfactory will be expected than the foregoing deduction. It will be required to state fully, and at length, what was the condition of persons and property; how justice, both civil and criminal, was administered; with the process, proceeding, and judgments of courts; in short, to give a kind of treatise of the old jurisprudence, with a precision, and from an authority, that will at once instruct the curious, and have weight with the learned. When this is done, it will be a foundation on which the superstructure of our juridical history may be raised with consistence; every modification, and addition, being pursued in the order in which it arose, the connexion and dependence of the several parts will be viewed in a new light; and the reason and grounds of the law be investi-

gated and explained more naturally, and, it is trusted, with more success than in any discourse, or desultory comment upon our ancient statutes, however copious and learned.

In order to lay this foundation of the subsequent History, it seems, that some point of time during the period between the Conquest and the reign of king John should be chosen, and that the contemporary law of that time, in all its branches, should be stated with precision and minuteness. The laws of Edward the Confessor, considered, according to the present opinion, as a performance of some writer in the reign of William Rufus, and the laws of Henry I. are the earliest documents that could at all be viewed with any hopes of information of this kind; but these throw so little light on the Norman jurisprudence, that they furnished small assistance, even in the historical sketch contained in the preceding chapter. The new jurisprudence seems not to have been thoroughly established, or at least tolerably explained, till the reign of Henry II. when we meet with the treatise of Glanville. The method, scope, and extent of this venerable book mark the reign of Henry II. as the most favourable period for our purpose. As, therefore, it may be collected with considerable accuracy from that author, what the law was towards the end of the reign of Henry II. we shall, with his aid, take a complete view of it; and, having done that, we shall proceed with more confidence to consider the subsequent changes made by parliament and by courts in the reigns of Henry III. Edward I and his successors, as to an enquiry that may be followed with ease, instruction, and delight. This account of our laws at the close of Henry II.'s reign will be divided into the rights of persons, the rights of things, and the proceedings of courts. We shall begin with the first.

The people, as among the Saxons, were divided into freemen and slaves; though the latter assumed under the Norman polity a new appellation, and were called *villani*, or *villains*.

Of villains, those were called *nativi* who were such à *nativitate*; as when one was descended from a father and mother who were both villains à *nativitate*. If a freeman married a woman who was born a villain, and so held an estate in villenage, in her right, as long as he was bound to the villain services due on account of such tenure, he lost, *ipso facto*, his *lex terræ*, as a villain à *nativitate*. If children were born from a father who was *nativus* to one lord, and a mother who was *nativa* to another lord, such children were to be divided proportionably between the two lords (a).

Of villains.

A villain might obtain his freedom in several different ways. The lord might quit-claim him from him and his heirs for ever; or might give or sell him to some one, in order to be made free: though it should be observed, that a villain could not purchase his freedom with his own money; for he might in such case, notwithstanding the supposed purchase, be claimed as a villain by his lord; for all the goods and chattels of one who was a *nativus* were understood to be in the power of his lord, so as that he could have no money, which could be called his own, to lay out in a redemption of his villenage. However, if some stranger had bought his freedom for him, the villain might maintain such purchased freedom against his lord; for it was a rule, that where any one quit-claimed a villain *nativus* from him and his heirs, or sold him to some stranger, the party who had so obtained his freedom, if he could establish it by a charter, or some other legal proof, might defend himself against any claims of his lord and his heirs: he might defend his freedom in court by duel, if any one called it in question, and he had a proper witness who heard and saw the manumission. But though a man could make his villain *nativus* free, as far as concerned *his* claim, and that of his heirs, he could not put him in a condition to be considered as such by others; for if such a freed man was produced

(a) Glanv. lib. 5. c. 6.

in court against a stranger to deraign a cause (that is, to be the champion to prove the matter in question), or to make his law (*a*), or law-wager, as it has since been called, and it was objected to him that he was born in villenage, the objection was held a just cause to disqualify him for those judicial acts; nor could the original stain, says Glanville, be obliterated, though he had since been made a knight. Again, a villain *à nativitate* would become *ipso facto* free, if he had remained a year and a day in any privileged town, and was received into their *gylda* (or guild, as it has since been called) as a citizen of the place (*b*).

Nothing is said by Glanville concerning the different ranks of freemen; we shall therefore proceed to the next object of consideration, which is, the right to property claimed by individuals under various titles and circumstances; as *dos*, or dower, belonging to a widow, *maritagium*, and the like; after which we shall speak more particularly about succession to lands, and the nature of tenures, as the law stood in the reign of Henry II.

The term *dos*, or dower, had two senses.
 Dower. In the common and usual sense, it signified that property which a freeman gave to his wife *ad ostium ecclesiæ*, at the time of the espousals. We shall first speak of *dos* in this sense of it. When a person endowed his wife, he either named the dower specially, or did not. If he did not name it specially, the dower was understood, by law, to be the third part of the husband's *liberum tenementum*; for the rule was, that a reasonable dower of a woman should be a third part of her husband's freehold which he had at the time of the espousals, and was seised of in demesne. If he named the dower specially, and it amounted to more than the third, such special dower was not allowed, but it was to be admeasured to a fair third; for, though the law permitted a man to give less than a third in dower, it would not suffer him to give more (*c*).

(*a*) *Legem facere*.

(*b*) Glanv. lib. 5. c. 5.

(*c*) Ibid. lib. 6. c. 1.

If a man had but a small freehold at the time of the espousals when he endowed his wife, he might afterwards augment it to a third part, out of purchases he had made since; but if there had been no provisional mention of new purchases at the time of such assignment of dower, although the husband had then but a small portion of freehold, and had made great acquisitions since, the widow could not claim more than the third part of the land he had at the time of the espousals. In like manner, if a person had no land and endowed his wife with chattels, money, or other things, and afterwards made great acquisitions in land, she could not claim any dower in such acquisitions; for it was a general rule, that where dower was specially assigned to a woman *ad ostium ecclesiæ*, she could not demand more than what was then and there assigned (a).

A woman could make no disposal of her dower during her husband's life; but as a wife was considered *in potestate viri*, it was thought proper that her dower and the rest of her property should be as completely in his power to dispose of them; and therefore every married man, in his lifetime, might give, or sell, or alien in any way whatsoever, his wife's dower; and the wife was obliged to conform in this, as in all other instances, to his will. It is, however, laid down by Glanville, that this assent might be withheld: and if, notwithstanding this solemn declaration of her dissent (b) and disapprobation, her dower was sold, she might claim it at law after her husband's death; and, upon proof of her dissent, she could recover it against the purchaser (c). Besides, it must be remarked, that the heir in such case was bound to deliver to the widow the specific dower assigned her, if he could; and if he could not procure the identical land, he was to give her a reasonable *excambium*,

(a) Glanv. lib. 6. c. 2.

(b) The word used by Glanville is *contradicere*, which, in this and other places, he seems to use in a sense implying something more formal and solemn than a common dissent and disapprobation.

(c) Glanv. lib. 6. c. 3.

as it was called, or recompense in value; and if he delivered her the land that was sold, he was in like manner bound to give a recompense to the purchaser (*a*). If the assignment at the church-door was in these words, "*Do tibi terram istam cum omnibus pertinentiis*;" and he had no appurtenances in his demesne at the time of the espousals, but he either recovered by judgment, or in some other lawful way acquired such appurtenances; the wife might, after his death, demand them in right of her dower (*b*).

If there was no special assignment of dower, the widow was entitled, as we before said, to the third part of all the freehold which her husband had in demesne the day of the espousals, complete and undiminished, with its appurtenances, lands, tenements, and advowsons; so that should there be only one church, and that should become vacant in the widow's life-time, the heir could not present a parson without her consent. The capital messuage was always exempt from the claim of dower, and was to remain whole and undivided; nor were such lands to be brought into the division for dower, which other women held in dower upon a prior endowment. Again, if there were two or more manors, the capital manor, like the capital messuage, was to be exempted, and the widow was to be satisfied with other lands. It was a rule, that the assignment of dower should not be delayed on account of the heir being within age.

If land was specially assigned for dower *ad ostium ecclesie*, and a church was afterwards built within the fee, the widow was to have the free presentation thereof; so as, upon a vacancy, to give it to a clerk, but not to a college, because that would be depriving the heir of his right for ever; however, should the husband in his life-time have presented a clerk, the presentee was to enjoy it during his life, though the presentation was made after the wife had

(*a*) Glanv. lib. 6. c. 13.

(*b*) Ibid. c. 12.

been endowed of the land, and it might look like an anticipation and infringement of the profits and advantage to which she was entitled by her special assignment of dower. Yet, should the husband himself have given it to a religious house, as this would be an injury to the wife similar to that above stated respecting the heir, the church after his death was to be delivered back to the widow, that she might have free presentation to it ; but after her death, and that of her clerk, the church would return back to the religious house to be possessed for ever.

If a woman had been separated from her husband *ob aliquam sui corporis turpitudinem*, or on account of blood and consanguinity, she could not claim her dower ; and yet in both these cases the children of the marriage were considered as legitimate, and inheritable to their father. Sometimes a son and heir married a woman *ex consensu patris*, and gave her in dower some part of his father's land, by the assignment of the father himself. Glanville states a doubt upon this ; whether in this case, any more than in that of an assignment by the husband himself, the widow could demand more than the particular land assigned ; and whether, upon the death of the husband before the father, she could recover the land, and the father be bound to warrant her in the possession of it (a) ?

Thus far of one sense of the word *dos*. It was understood differently in the Roman law, where it properly signified the portion which was given with the woman to her husband ; which corresponds with what was commonly called in our law *maritagium* : but we shall defer saying any thing of *maritagium* till we have considered the nature of alienation and descent, with some other properties of land.

Respecting the alienation of land, the first consideration that presents itself, is the indulgence allowed in favour

(a) Glanv. lib. 6. c. 17.

of gifts *in maritagium*. Every freeman, says Glanville, might give part of his land with his daughter, or with any other woman, *in maritagium*, whether he had an heir or not, and whether his heir agreed to it or not; nay, though he made that solemn declaration of his dissent, which, we have just seen, had the effect of rendering an alienation of dower ineffectual and void (a). A person might give part of his freehold *in remunerationem servi sui*, or to a religious place in free alms; so that, should such donation be followed by seisin, the land would remain to the donee and his heirs for ever, if an estate of that extent had been expressed by the donor; but if the gift was not followed by seisin, nothing could be recovered against the heir without his consent: for such an incomplete gift was considered by the law rather as a *nuda promissio* than a real donation. Thus then, on the above occasions, any one might, in his life-time, give a reasonable part of his land to whomsoever he pleased; but the same permission was not granted to any one *in extremis*; lest men, wrought upon by a sudden impulse, at a time when they could not be supposed to have full possession of their reason, should make distributions of their inheritances highly detrimental to the interest and welfare of tenures. The presumption, therefore, of law in case of such gifts was, that the party was insane, and that the act was the result of such insanity, and not of cool deliberation. However, according to Glanville, even a gift made *in ultimâ voluntate* was good, if assented to and confirmed by the heir (b).

In the alienation of land some distinctions were made between *hæreditas* and *quæstus*, land descended as an inheritance, and land acquired by purchase. If it was an inheritance, he might, as was said, give it to any of the before-mentioned purposes. But, on the other hand, if he had more sons than one who were *mulieratos*, that is, born in

(a) Glanv. lib. 7. c. 1. (b) Ibid.

wedlock, he could not give any part of the inheritance to a younger son against the consent of the heir; for it might then happen, from the partiality often felt by parents towards their younger children, that, to enrich them, the eldest would be stripped of the inheritance. It was a question whether a person, having a lawful heir, might give part of the inheritance to a bastard-son; for if he could, a bastard would be in better condition than a younger son born in wedlock; and yet it should seem that the law allowed such donation to a bastard son.

If the person who wanted to make a donation was possessed only of land by *purchase*, he might make a gift, but not of all his purchased land; for he was not, even in this case, allowed intirely to disinherit his son and heir: though if he had no heir male or female of his own body, he might give all his purchased lands for ever; and if he gave seisin thereof in his life-time, no remote heir could invalidate the gift. Thus a man, in some cases, might give away, in his life-time, all the land which he had himself purchased, but not, as in the civil law, make such donee his heir; for, says Glanville, *solus Deus hæredem facere potest, non homo*.

If a man had lands both by inheritance and by purchase, then he might give all his purchased land to whomsoever he pleased, and afterwards might dispose of his lands by inheritance, in a reasonable way, as before stated. If a person had lands in free soccage, and had more sons than one, who by law should inherit by equal portions, the father could not give to one of them, either out of lands purchased or inherited, more than that reasonable part which would belong to him by descent of his father's inheritance: but the father might give him his share.

We may here observe, that many questions of law arose, owing to certain consequences which sometimes resulted from this liberality of fathers towards their children. First, suppose a knight, or freeman, having four or more sons, all born of one mother, gave to his se-

cond son, to him and his heirs, a certain reasonable part of his inheritance, with the consent of the eldest son and heir (to avoid all objections to the gift), and seisin was had thereof by the son, who received the profits during his life, and died in such seisin, leaving behind him his father and all his brothers alive; there was a great doubt among lawyers, in Glanville's time, who was the person by law entitled to succeed. The father contended, he was to retain to himself the seisin of his deceased son, thinking nothing more reasonable than that the land which was disposed of by his donation, should revert again to him. To this it might be answered by the eldest son, that the father's claim could not be supported; for it was a rule of law, *Nemo potest esse hæres et dominus. quòd nemo ejusdem tenementi simul potest esse hæres et dominus* (a), that no one could be both heir and lord of the same land: and by the force of the same rule, the third son would deny that the land could revert to the eldest; for as he was heir to the whole inheritance, he could not, as before said, be at once heir and lord; for he would become lord of the whole inheritance upon the death of his father, and therefore stood very nearly in the predicament in which we just stated the father himself to be. Thus, as by law the land could not remain with him, there was no reason, says Glanville, why he should recover it; and therefore, by the same reasoning, it appeared to Glanville, that the third son was to exclude all the other claimants.

A like doubt arose, when a brother gave to his younger brother and his heirs a part of his land, and the younger brother died without heirs of his body; upon which the

(a) In the times of Glanville and Bracton, the reservation of services might be made either to the feoffor, or to the lord of whom the feoffor held; they seem more commonly to have been made in the former manner: thus every such new feoffment in fee made a new tenure, and of course created a new manor; and so the law continued till stat. *quia emptores*, 18 Ed. 1. required feoffments in fee to be made with reservation of the services to the chief lord.

elder took the land into his hands, as being vacant and within his fee, against whom his own two sons prayed an assise of the death of their uncle; in which plea the eldest son might plead against the father, and the younger son against his elder brother, as before mentioned. And here the law is stated by Glanville to be this: that the father could not by any means retain the land, because he could not *simul hæres esse dominus*; nor could it revert to the donor, with the homage necessarily incident to it, if the donee had any heir, either of his body or more remote. Again, land thus given, like other inheritances, naturally descended to the heir, but never ascended: from all which it followed, that the plea as between the father and eldest son was at an end, as having no question in it; but that between the eldest and younger son went on, as before stated. And in this last case the king's court had taken upon it to determine, *ex æquitate*, that the land so given should remain to the eldest son (particularly if he had no other fee) to hold till the paternal inheritance descended upon him; for while he was not yet lord of his paternal inheritance, the rule *quòd nemo ejusdem tenementi simul potest hæres esse et dominus*, could not be said to stand in the way. But then it might be asked, whether, when he became by succession lord of that part of the inheritance, he was not heir also of it, as well as of the rest of the inheritance, and then fell within the meaning of that rule? To this Glanville answers, that it was a thing not at first certain, whether the eldest son would be the heir, or not; for should the father die first, he most undoubtedly would be so; and then he would cease to be lawful owner of the land he had acquired by succession from the uncle, and it would revert to the younger son as right heir: yet if, on the other hand, the eldest son died first, then it was plain he was to be the heir of the father; and therefore those two requisites of this rule, namely, the *jus hæreditarium* and *dominium*, did not concur in the same person. Such is the reasoning of

Glanville upon this curious point, in the law of descent, as understood in his time (a).

There are two observations to be made respecting gifts of land, and then we shall proceed to consider the law of descent more fully. One is, that bishops and abbots, whose baronies were held by the eleemosynary gift of the king and his ancestors, could not make gifts of any part of their demesnes, without the assent and confirmation of the king (b): the other is, that the heirs of a donor were bound to warrant to the donee and his heirs the donation, and the thing thereby given (c).

Of descent. Having incidentally alluded to some rules

which governed the descent of lands, it will now be proper to treat of the law of succession more at large. They divided heirs into those they called *proximi*, and those they considered as *remotiores*. *Proximi* were those begotten from the body, as sons and daughters: upon the failure of these, the *remotiores* were called in, as the *nepos* or *neptis*, the grandson or grand-daughter, and so on, descending in a right line *in infinitum*; then the brother and sister, and their descendants; then the *avunculus* (d), or uncle, as well on the part of the father as of the mother; and in like manner the *matertera*, or aunt; and their descendants. When therefore a person died leaving an inheritance, and having one son, it was a settled thing that the son succeeded to the whole. If he left more sons than one, then there was a difference between the case of a knight; that is, a tenant by *fædum militare*, or knight's service; and a *liber soke-mannus*, or free sokeman. If he was a knight or tenant by military service, then, according to the law of England, the eldest son succeeded to the father *in totum*; and none of

(a) Glanv. lib. 7. c. 1.

(b) Ibid.

(c) Ibid. c. 2.

(d) This is the expression used by Glanville; which is not strictly correct; *avunculus* and *matertera* being the uncle and aunt on the mother's side; as the uncle on the father's side was *patruus*. Indeed our author, after all, passes over this in a loose way.

his brothers had any claim whatsoever. But if he was a free sokeman, and possessed of soccage-land that had been anciently divisible, then the inheritance was divided among all the sons by equal parts; saving always to the eldest son, as a mark of distinction, the capital messuage; so, however, as he made a proportionate satisfaction to the other brothers on that account. But if the land was not anciently divisible, then it was the custom, in some places, for the eldest son to take the whole inheritance; in some, the youngest son.

If a person left only a daughter, then what we have said of a son held good with regard to her. And it was a general rule, whether the father was a knight or a sokeman, that where there were more daughters than one, the inheritance should be divided among them; saving, however, (as in the case of the son) the capital messuage to the eldest daughter. Where the inheritance was thus divisible between brothers or sisters, if one of them died without heirs of the body, the share of the party deceased was divided amongst the survivors. It was a rule, in these divisible inheritances, that the husband of the eldest daughter should do homage to the chief lord for the whole fee; the other daughters or their husbands being bound to do their services to the chief lord by the hand of the eldest, or her husband; and not to do homage or fealty to the husband of the eldest: nor were their heirs in the first or second descent; but those in the third descent from the younger daughters were bound by the law of the realm to do homage and pay a reasonable relief to the heir of the eldest daughter for their tenement. It was a rule, that no husbands should give away their wives' inheritance, or any part thereof, without the assent of their heirs; nor could they release any right that might belong to their heirs.

We have said before, that if a person had a son and daughter, or daughters, the son succeeded *in totum*; and therefore, if a man had more wives than one, and had daughters from two, and at length a son from a third, this son would alone take the whole inheritance of his father;

for it was a general rule, that a woman could never take part of an inheritance with a man (*a*), unless, perhaps, by the particular and ancient customs of some cities or towns: yet if a man had more wives than one, and had daughters from each, they all succeeded alike to the inheritance, the same as if they had been born of the same mother.

Suppose a man died without leaving a son or a daughter, but had grandchildren; they succeeded in like manner as children; those in the right line being always preferred to those in the transverse. However, we have before seen (*b*), that when a man left a younger son, and a grandson of his eldest son, who was dead, there was great difficulty in determining the succession in such case between the son and grandson. Some thought the younger son was more properly the right heir than the grandson; for the eldest son not having lived till he became heir, the younger son, by outliving both his brother and father, ought properly to be the father's successor. It seemed to others, that the grandson should be preferred to the uncle; for as he was heir of the body of the eldest son, and, if he had lived, would have had all his father's rights, he, it was said, should more properly succeed in the place of his father: and so Glanville thought, provided the eldest son had not been *foris-familiated* by the grandfather. A son was said to be *foris-familiated*, if his father assigned him part of his land, and gave him seisin thereof, and did this at the request, or with the free consent of the son himself, who expressed himself satisfied with such portion: and it was clear law, that in such case the heirs of the son could not demand as against their uncle, or any one else, any more of the inheritance of the grandfather than what was so assigned to their father; though the father himself, had he survived the grandfather, might notwithstanding have claimed more. Where it happened, however, that the

(*a*) Glanville's words are, *mulier nunquam cum masculo partem capit in hereditate aliquâ.*

(*b*) Vid. ant. 41.

eldest son had in his father's life-time done homage to the chief lord of the fee for his father's inheritance, as was not unfrequently the case, and died before his father, there it was held beyond question, that the son of such eldest son should be preferred to the uncle, although there had been a foris-filiation.

Such was the law of descent in Glanville's time; and this will very properly be followed by a short view of some of the duties incumbent on heirs; with the incidents of inheritance and succession; such as testaments, wardship, bastardy, and escheat.

Heirs, says Glanville, were bound to observe the testaments made by their fathers, or their ^{Of testaments.} other ancestors to whom they were heirs, and to pay all their debts. For every freeman, not incumbered with debts beyond the amount of his effects, might, on his death-bed, make a reasonable division of his property, by will; so as he complied with the customs of the place where he lived; one of which commonly was, first, to remember his lord by his best and principal chattel; then the church; and after these, he might dispose of the remainder as he pleased. However the customs of particular places might lay this restriction upon wills, no person was bound, by the general law of the kingdom, to leave any thing by will to any particular person, but was at liberty to act as he pleased; it being a rule of law, that *ultima voluntas esset libera*. A woman who was *sui juris* might make a will; but if she was married, she could do nothing of this sort without her husband's authority, as it would be making a will of his goods. But Glanville thought it would be a proper testimony of affection and tenderness, for a husband to give to his wife *rationabilem divisam*, that is, a third part of his effects; this being what she would be intitled to, if she had survived him; and it seems that it was not unfrequent for husbands to give a sort of property to their wives in this third part, even during the coverture.

The passage in Glanville from which this and the following account of testaments is taken, throws great obscurity upon the subject, and lays a foundation for the doubt that long divided lawyers, and is not yet settled, respecting the power of making wills of chattels, at common law. After having expressly laid down, that by the general law of the kingdom, no person was bound to leave any thing by will to any particular person, and that the third part left to the wife was dictated rather by a moral than legal obligation, he goes on in the following remarkable words: "When a person, says he, is about to make his will, if he has more than enough to pay his debts, then all his moveables shall be divided into three equal parts; of which one shall go to the heir, another to the wife; the third be reserved to himself, over which he has the power of disposal as he pleases: if he dies without leaving a wife, a half is to be reserved to the testator (a)." Thus far respecting the law of testaments for the disposition of moveables; to which he adds, conformably with what we have before shewn, that an inheritance could not be given by last will (b).

A testament ought to be made in the presence of two or more lawful men, either clergy or lay, being such persons as might afterwards become proper witnesses thereto. The executors of a testament were such persons as the testator chose to appoint to undertake the charge of it. If the testator appointed none, the *propinquet consanguinei*, by which were meant, as may be supposed, the nearest of kin to the deceased, might interpose; and if there was any one, whether the heir or a stranger, who detained any effects of the deceased, such executors or next of kin might have the following writ directed to the sheriff, to cause a reasonable division of the effects to be made:

(a) The progress of this doctrine, and the discussions upon it, will be related in the proper place.

(b) Glanv. lib. 7. c. 5.

Rex vicecomiti salutem: præcipio tibi quòd justè et sine dilatione facias stare rationabilem divisam N. sicut rationabiliter monstrari poterit quòd eam fecerit, et quòd ipsa stare debeat, &c. (a). If the person, summoned by authority of this writ, said any thing against the validity of the testament; that it was not properly made, or that the thing demanded was not bequeathed by it; such inquiry was to be heard and determined in the court christian; for all pleas of testaments, says Glanville, belong to the ecclesiastical judge, and are there decided upon by the testimony of those who were present at the making of the will (b).

If a person was incumbered with debts, he could not make any disposition of his effects (except it was for payment of his debts) without the consent of the heir; but if there was any thing remaining over and above the payment of his debts, that residue was to be divided into three parts, as above mentioned; and he might, says Glanville, make his will of the third part. Should the effects of the deceased not be sufficient to pay his debts, the heir was bound to make up the deficiency out of the inheritance which came to him; so that we see the reason why, under such circumstances, the heir's consent was necessary towards a will. It seems, however, that the heir was not bound to make up this deficiency, unless he was of age (c).

Heirs were considered in different lights, according as they were of full age, or not. An heir of full age might hold himself in possession of the inheritance immediately upon the death of the ancestor; and the lord, though he might take the fee together with the heir into his hands, was to do it with such moderation, as not to cause any disseisin to the heir; for the heir might resist any violence, provided he was ready to pay his relief and do the other services. Where the heir to a tenant

(a) Glanv. lib. 7. c. 6, 7.

(b) Ibid. c. 8.

(c) Ibid.

holding by military service was under age, he was to be in custody of his lord till he attained his full age; which, in such tenure, was when he had completed the twenty-first year. The son and heir of a sokeman was considered as of age when he had completed his fifteenth year: the son of a burgess, or one holding in burgage tenure, was esteemed of age, says Glanville, when he could count money and measure cloth, and do all his father's business with skill and readiness. The lord, when he had custody of the son and heir, and of his fee, had thereby, to a certain degree, the full disposal thereof; that is, he might, during the custody, present to churches, have the marriage of women, and take all other profits and incidents which belonged to the minor and his estate, the same as he might in his own; only he could make no alienation which would affect the inheritance. The heir was, in the mean time, to be maintained with a provision suitable to his estate; the debts of the deceased were to be paid in proportion to the estate and time it was in custody of the lord, who was not by such liens to be entirely deprived of his benefit by the custody: with that qualification, however, lords were bound *de jure* to answer for debts of the ancestor.

The lord also, as he had all emoluments belonging to the heir, was to act in all his concerns, and prosecute all suits for recovery of his rights, where such suits were not delayed by the usual exception to the infancy of the party. But the lord was not bound to answer for the heir, neither upon a question of right, or of seisin, except only in one case; and that was, where there had fallen to the heir, since his father's death, the custody of some minor: for then, if the minor came of age, and the inheritance was not delivered to him, he was intitled to have an assise and recognition *de morte antecessoris*: and in this case, as the recognition was not by law *to remain*, on account of the infancy of the heir, his lord was to answer for him. If a minor was appealed of felony, he was to be attached by safe and sure pledges; but yet he was not bound to answer to

the appeal till he was of age (*a*). It was the duty of those who had the custody of heirs and their fees, to restore the inheritance to the heir in good condition, and also free from debts; in proportion, as was before said, to the size of the inheritance, and to the time it was in custody (*b*). If there was any doubt whether an heir was of age or not, yet still the lord had the custody of the heir and his estate until he was proved to be of age by lawful men of the vicinage, upon their oaths.

If an heir within age had more lords than one, the chief lord, that is, he to whom he owed allegiance for his first fee, was to have the preference of the custody: an heir, however, so circumstanced, was still to pay to the lords of his other fees their reliefs, and other services. In the case of a holding of the king *in capite*, the custody belonged to the king completely and fully, whether the heir held of other lords or not: for the maxim was, *dominus rex nullum habere potest parem, multò minùs superiorem*. But in burgage-tenure the king had not this preference to other lords. The king might commit to any one such custodies as belonged to him; and they were committed sometimes *pleno jure*, and sometimes not. In the latter case, the committee was to render an account thereof at the exchequer; in the former, not: in the former case, he might present to churches, and do other acts, as he might in his own estate (*c*).

This was the law concerning the custody of heirs, in military tenure. The heirs of *sokemen*, upon the death of their ancestors, were, according to Glanville, to be in the custody of their *consanguinei propinqui*, which must mean, as in a former passage, the next of kin; with this qualification, that if the inheritance descended *ex parte patris*, the custody belonged to the descendants *ex parte matris*; and so *vice versâ*. For the opinion was, that the custody of a person should not, by law, belong to one who, standing

(*a*) Glanville, lib. 7, c. 9.

(*b*) Ibid.

(*c*) Ibid, c. 10.

near the succession, might be suspected of having views upon the inheritance (a).

Marriage. We shall next speak of the custody of *female heirs*. If a woman was a minor, she was to be in the custody of her lord till she became of full age, and then the lord was bound to find her a proper marriage. If there were more than one, he was to deliver to each her reasonable portion of the inheritance. If a woman was of full age, then also she was to be in the custody of her lord till she was married by his advice and disposal; for it was the law and custom of the realm, that no woman who was heir to land should be married but by the disposal and assent of her lord: and this rule operated so far, that if any one married his daughter, who was to be his heiress, without the assent of his lord, he was by strictness of law to be for ever deprived of his inheritance; nor could he retain it but by the mercy and pleasure of the lord. Nevertheless, when such a person applied to the lord for licence to marry his daughter, the lord was bound to give his consent, or shew some reasonable cause to the contrary: if not, the father might even proceed to marry her according to his own wish and inclination, without the lord's concurrence.

Upon this subject of marrying women Glanville puts a case: Whether a woman possessed of land in dower might marry as she pleased, without the assent of her *warrantor*, that is, the heir of her husband; and whether by so doing she would lose her whole dower? Some thought she ought not to lose her dower, because such second husband was not by the law and custom of the land bound to do *homage* to the warrantor, but only a simple *fealty*; which was merely, in case the wife should die before the husband, to preserve the homage from being entirely lost, for want of some outward mark of tenure. But, notwithstanding that, Glanville thought she was bound to obtain the assent

(a) Glanv. lib. 7. c. 11.

of her warrantor, or lose her dower, unless she had other lands, either by *maritagium* or by inheritance; for then it was sufficient if she had the assent of the chief lord: and this was on account of the simple fealty only which the husband was bound to do to the lord. If the inheritance was held of more than one lord, it was sufficient to obtain the assent of the chief lord (a).

If women, while in custody of their lords, did any thing which was a cause of forfeiture, and this was made out against them in a lawful way, the offender lost her right to the inheritance, and her share accrued to the rest; but if they had all incurred a forfeiture, then the whole inheritance fell to the lord, as an *escheat*.

Widows were not to be again in custody of their warrantors, though, as has been already related, they were to have their assent before they married. Women were not to forfeit their inheritance on account of any incontinence: not that the maxim, *putagium hæreditatem non adimit*, meant this indemnity of women in case of incontinence, for that was to be understood of the consideration the law had of a son begotten under such circumstances, and born after lawful wedlock; who was thereby intitled to succeed to the inheritance as a lawful heir; according to another rule, *filius hæres legitimus est, quem nuptiæ demonstrant* (b).

This brings us to consider the law of legitimacy. It was held, that no *bastardus* (c), or bastard, was a legitimate or lawful heir, nor any one not born in lawful wedlock. If any one claimed an inheritance as heir, and it was objected that he was not heir, because he was not born in lawful wedlock; then the plea ceased in the king's court, and it was commanded to the archbishop or bishop, whichever it might be, to make enquiry of the marriage, and to

Of bastardy.

(a) Glanv. lib. 7. c. 12.

(b) Ibid.

(c) In German *bastart*; from *bas*, says Spelman, which signifies *infimus*, and metaphorically *spurius*, *impurus*; and *start*, which signifies *ortus*, or *editus*. So we say in English *upstart*; as it were, *subito exortus*. Vid. Spelm. voce *Bastardus*.

signify to the king, or his justices, his judgment thereon; for which purpose there issued a writ to the following effect: *Rex episcopo salutem: Veniens coram me W. in curiâ meâ petit versus R. fratrem suum quartam partem fædi unius militis in villâ, &c. sicut jus suum; et in quo idem R. jus non habet, ut W. dicit, eò quòd ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ christianitatis inde faciatis quod ad vos spectat. Et cùm loquela illa debitum coram vobis finem sortita fuerit, mihi literis vestris significetis, quid inde coram vobis actum fuerit, &c. (a).*

Upon the subject of legitimacy, there was this curious question: If a person was born before his father married his mother, whether, after the marriage, such child was to be considered as a lawful heir? And Glanville says, that though by the canons and Roman law (meaning a law of Justinian adopted in a constitution made in the time of Pope Alexander III. about thirty years before) such a child was a lawful heir; yet by the law and custom of this realm he was not to be received as an heir, to hold or claim any inheritance. The question, whether born before or after marriage, we have seen, was examined before the ecclesiastical judge, whose judgment was to be reported to the king or his justices; but when the spiritual judge had certified the answer to that question, the king's court made use of it as it pleased, and denied or adjudged the inheritance in dispute to either party, according to its own rule of determination: so that the ecclesiastical court only answered whether the party was born before or after marriage; the king's court determined *who* was heir (b).

As a bastard could have no heir but of his body, this gave occasion to a very particular question of inheritance and succession. If a person made a gift of land to a bastard, reserving a service or any thing else, and received homage,

(a) Glanv. lib. 7. c. 13, 14.

(b) Ibid. c. 15.

and the bastard died in seisin of the land, without leaving any heir of his body, it was a doubt in Glanville's time, who was to succeed to the land; it being clearly held that the lord could not; though it was determined, that if a bastard died without a will, his goods went to his lord; and if he held of more than one, each was to take that which was found within his fee (a).

It may be remarked here, that all the effects of an usurer, whether he made a will or not, belonged to the king: this was meant as a penalty upon usury, after the death of the party; for in his life-time he could not be proceeded against criminally. Among other inquisitions which used to be made for the king, one used to be made of a person dying in this offence (for so it was called) by twelve lawful men of the vicinage, upon their oaths: and if it was proved, all the moveables and chattels of the deceased usurer were taken for the king's use; his heir was disinherited; and the land reverted to the lord. If a person had been notoriously guilty of usury, but had desisted from the practice, and died a penitent, his property was not to be treated as the property of an usurer. The point therefore was, whether a man *died* an usurer; and only in such case could his effects be confiscated (b).

To finish the subject of descent to heirs; it must be remarked, that next after those we have mentioned, the *ultimus hæres*, if he could be so called, of every man was his lord: for when a person died without a certain heir (c), the lord of the fee might, of right, take into his hands and retain the fee, whether such lord

(a) Glanv. lib. 7. 16.

(b) Ibid.

(c) This law of *ultimus hæres*, laid down so generally by Glanville, is said by himself, just before, not to take place where a bastard died without heirs of his body. The reason of this exception to the analogy of tenures does not appear. In cases of forfeiture where the goods even went to the king, yet the land escheated to the lord. We shall see, that in the time of Bracton, the land, in this case of bastardy, escheated to the lord, and so it does at this day.

It is worthy of remark, that in Scotland, where feudal rights were in general more regarded than in England, the lord has long been deprived

was the king or any other person. Nevertheless, should any one afterwards come and say he was the right heir, he might, either by the grace of the lord, or at least by the king's writ, be let in to sue for the inheritance, and make his claim out in court; yet, in the mean time, the land remained in the lord's hands; it being a rule, that when a lord had any doubt about the true heir to his tenant, he might hold the land till that was made out in due form of law. This was like what we have seen was done, when there was a doubt whether an heir was of age or not; with this difference, that in this case the land, in the mean time, was considered as an escheat, which was to all intents and purposes the absolute property of the lord; in the other, it was not looked upon as his own, but only as *de custodia*.

Lands reverted to the lord by escheat, not only on failure of heirs, but by various causes of *forfeiture*. If any one was convicted of felony, or confessed it in court, he lost his inheritance by the law of the land, and it went to his lord as an escheat. Where a person held of the king *in capite*, in such case, as well his land as his moveables and chattels, wherever they were found, were taken for the king's use. Again, if an outlaw, or one convicted of felony, held of any one but the king, then also all his moveables belonged to the king, and his land was to remain in the king's hands for a year; but at the expiration of that time, it was to revert to the lord of the fee: this, however, was *cum domorum subversione et arborum extirpatione*, that is, according to the barbarous and unwise policy of those days, not till the king had first subverted all the houses, and extirpated all the trees thereon.

In short, when a judgment passed in court, that a man should be *exheredatus*, his inheritance reverted to the lord of the fee, as an escheat. If any one was condemned for theft, his moveables and chattels went to the sheriff of the

of this casualty, and the king is considered as the *ultimus hæres* not only of the bastard, but in all cases of failure of heirs; upon the principle, *quod nullius est, cedit domino regi*. 2 Blackst. 249. Ersk. Prin. b. 3. tit. 10.

county; but the lord of the fee took the land without waiting the year, as in the former case, because theft was not an offence against the king's crown, as robbery and homicide were. When any one was regularly and legally outlawed, he forfeited his lands, and though he was afterwards restored by the king's pardon, neither he nor his heirs could, by reason of such pardon, recover the land once forfeited, against the lord; for, notwithstanding the king remitted the pains of forfeiture and outlawry as far as regarded himself, he could not thereby infringe the rights of others (a).

It was to illustrate the title of *maritagium*, that we were at first led into this long digression about the law of descent, legitimacy, and escheat: to that we now return; and shall conclude what is to be said upon it, by speaking of the tenure by which a tenant *in maritagio* held his estate.

Maritagium was of two kinds: one was called *liberum*, or free; the other, *servitio obnoxium*, liable to the usual services. *Liberum maritagium* was when a freeman gave part of his land with a woman in marriage, quit and freed from him and his heirs of all service towards the chief lord. Land so given enjoyed this immunity as low down as to the third heir; and during that time no homage was to be done: but after the third heir was dead, the land became subject to its old services, and homage was again to be done for it. If land was given *in maritagium servitio obnoxium*, that is, with a reservation of the legal services; in that case, the husband of the woman and his heirs down to the third were to perform that service, but yet without doing any homage; but the third heir, says Glanville, was to do homage for the first time, and so were all his heirs for ever after; though, in case of *liberum maritagium*, we have seen that homage was not to be done till after the third heir was dead. In all these cases, however, where no homage was done, yet a fealty

(a) Glanv. lib. 7. c. 17.

was to be performed by the woman and her heirs, either by solemn promise or by oath, almost in the same form and words in which homage was done.

When a man having land given him *in maritagium* with a woman, had by that woman an heir born, whether male or female, who was heard to cry within four walls, *claman-tem et auditum infra quatuor parietes*, as they expressed it, and survived his wife; then, whether the heir lived or not, the *maritagium* remained to the husband during his life, and after his death reverted to the donor or his heirs: but if he had no heir of his wife, then the *maritagium* reverted to the donor or his heirs, immediately upon her death. And this was a sort of reason why homage was not usually received for these *maritagia*. For when land was given in any way, and homage was received for it, the effect of homage was such that the land could not, by law, return to the donor or his heirs; which would be contrary to the intention of these gifts *in maritagium*. If the woman who had land thus given *in maritagium* had survived her husband, and married a second, the law was the same as to his retaining the land in case he survived, whether the first husband left an heir or not (a).

If land was to be claimed either by the wife or her heir, as having been given *in maritagium*, there was a difference between such a claim when against the donor and his heirs, and when against a stranger. If it was against the donor and his heirs, then it might be in the election of the demandant to sue in the court christian, or in the secular court. For questions of *maritagium* were considered as belonging to the ecclesiastical judge, if the demandant pleased to resort to him, on account of the mutual promises made by the man and woman at the time of the espousals. But if the suit was against a stranger, then it was to be determined in the lay court, in the same way as other suits about lay-fees. It must be observed, that such

(a) Glanv. lib. 7. c. 18.

a suit, like a plea of dower, was not to be conducted without the presence of the warrantor; and as far as concerned the warrantor, every thing was to be ordered as in an action for dower; all which will be made plain when we come to speak of that proceeding: only this must be remembered, that the third heir, after he had performed his homage, might go on with the suit without the authority of his warrantor (a).

The subject of homage and relief deserves further consideration, and will properly enough ^{Homage.} follow what has just been said. Upon the death of the father or other ancestor, the lord of the fee was to receive the homage of the right heir whether he was of age or not, so as the heir was a male; for women could, by law, do no homage, though they sometimes used to do fealty; yet, when they married, their husbands were to do homage for them, in cases where it was due for the fee they held. If a male heir was a minor, the lord could not have custody of the fee nor of the heir till he had received homage; it being a general rule, that a lord could demand no service, relief, or any thing else from the heir, whether he was of age or not, till he had received homage for the fee in respect of which he claimed such relief or service; and this was on account of the protection the heir could claim of his lord after homage, but not before. A person might do homage to different lords for different fees; but one of these was to be the chief homage, and distinguished above the rest, by being accompanied, says Glanville, with allegiance (b); which was to be performed to that lord of whom the homager held his chief freehold.

Homage was to be done in this way: the person was to profess, that "he became *HOMO domini sui*, the man of "his lord, to bear him faith for the tenement in respect of "which he did homage; to preserve his terrene honour in "all things, saving only the faith he owed to the king and

(a) Glanv. lib. 7. c. 18.

(b) *Cum ligeanciâ factum.*

“his heirs.” From this it is clear, that it would be a breach of faith and of homage for a vassal to do any thing to the damage of the lord (a), unless in his own defence, or at the command of the king, when his lord had taken up arms against his sovereign lord the king: and, in general, it would be a breach of faith and of homage to do any thing *ad exhæredationem domini sui, vel dedecus corporis sui*. If then several lords, to each of whom a tenant had done homage, should make war on each other; it was the tenant’s duty to obey the commands of his chief lord, and to go with him in person, if he required it, against any of the rest; notwithstanding which, in all other respects, the services owing to such other lords were still to be duly rendered by the tenant. The penalty of doing any thing to the disherison of a lord, was for the tenant and his heirs to lose, for ever, the fee held of him: the same, if the tenant put violent hands upon him, to hurt or do him any atrocious injury (b).

Glanville makes it a question, whether a tenant could be put to answer in his lord’s court for default in any of the above particulars, and whether the lord could *distrain* him, by judgment of his court, without the command of the king or his justices; or without the king’s writ, or that of his chief justice. And he thought that the law allowed a lord, by the judgment of his court, to call upon and *distrain* his homager to come to his court; and if the homager could not purge himself against the charge of his lord *tertiâ manu*, by three persons, or as many more as the court might require, he should be *in misericordiâ domini* to the amount of the whole fee he held of him. Glanville puts another question; whether a lord could *distrain* his homager to appear in his court to answer for the service of which the lord complained he deforced him, or made default in payment; and he thought that the lord might, without the command of the king or his justices; and that in

(a) *Dominum suum infestare.*

(b) Glanv. lib. 9. c. 1.

such a proceeding the lord and his homager might come to the duel, or the great assise, by means of any one of the *pares* who chose to make himself a witness that he had seen the tenant or his ancestors do to the lord and his ancestors the service in dispute, which he was ready to *de-raign* or prove; and that if the tenant was in this manner convicted, judgment should be for him to lose the whole fee which he held of the lord. Where a lord found he could not in this manner *justitiare*, or compel his tenant to appear in his court, he was obliged to resort to the process of the *curia regis* (a); that is, to the command or writ of the king, or his justices.

Homage might be done by every freeman, as well those within age as those who were of full age, whether clergy or lay. Yet bishops consecrated could not do homage to the king, though they held their bishoprics as baronies, but only fealty; and this they performed with an oath. It was usual for bishops elect to do homage before their consecration (b).

It is to be understood, that homage was not a mere personal thing. It was done in respect of some benefit derived from property or possession. It was due in respect of lands, tenements, services, rents in certain, whether in money or other things; but without some of these causes no homage was due to a lord, though it might be due to the king. Again, homage was not due in respect of all lands; for it was not due on account of dower, nor free marriage, nor from the eldest sister on account of the fees of younger sisters, till after the third descent; nor of a fee given in free alms (c).

Homage might be received by any free man or woman, whether of age or not, as well clergy as lay. If homage had been done to a woman, and she married, it was to be done over again to the husband; yet, in a case somewhat similar, namely, when a person, by a final concord made

(a) Glanv. lib. 9. c. 1.

(b) Ibid.

(c) Ibid. c. 2.

in court, recovered land for which a relief had been paid to the chief lord, it was a question, whether the person recovering was bound to pay a relief, upon his coming into possession thereof (a).

In consequence of homage being performed, there arose a mutual relation between the parties; according to the rule, *quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio; præter solam reverentiam*. Therefore, when land was given for the service and homage of the tenant, and any one afterwards instituted a suit for that land, the lord was bound to warrant it to him, or to give him in lieu thereof *competens excambium*, an equivalent in value.

When an heir who had been in custody came of age, the inheritance was restored to him without paying a relief; that being remitted in consideration of the profit the lord had derived from the custody. A female heir, whether of age or not, was continued in custody till she was married by the advice of her lord. If she had been within age when she first came into the lord's custody, then upon her marriage the inheritance was quit of all relief; but if she was of age when she first came into the lord's custody, though she continued some time in custody before marriage, yet her husband was to pay a relief upon the marriage; and a relief once paid by the husband, was an acquittal both to husband and wife, during their several lives, for any relief on account of the inheritance: so that neither the wife nor her second husband, if she had one, nor the first husband, should he survive her, could be called upon to pay any relief (b).

If the male heir was of age when his ancestor died, and was well known to be the heir, he might hold himself in the inheritance even against the will of the lord, as we before said; provided he made a tender of his homage, and a reasonable relief, in the presence of credible persons.

(a) Glanv. lib. 9. c. 3.

(b) Ibid. c. 4.

The relief of one knight's fee, according to the custom of the realm, was said to be reasonable at a hundred shillings. The relief in soccage-tenure was one year's value of the land. As to baronies, nothing certain was fixed concerning their relief; but the relief they were to pay was measured by the pleasure and mercy of the king alone, to whom it was due. The law was the same in serjeanties (a).

When the lord and the heir had come to an agreement respecting what was to be paid for relief, the heir might exact reasonable aids from *his* homagers; always proportioning this demand to their circumstances, and the size of their fees; that it might not become such a grievous imposition as would intirely destroy their *contenement*, or, to use an English term which has been formed from it, their *countenance*, and appearance in the world: and no other measure was settled for ascertaining these aids but this regard to facts and circumstances. With the above precautions, a lord, in other cases, might exact similar aids of his tenants; as when he made his son and heir a knight, or when he married his eldest daughter. Glanville made a question, whether lords could demand these aids of their tenants to enable them to carry on their wars? The practice, at least, was for them never to attempt to distrain for aids on this occasion, but to leave them to the voluntary generosity of their tenants. For the other aids, so long as they were reasonable, lords might, by judgment of their courts, without the *precept* or command of the king or his chief justice, distrain their tenants by the chattels that were to be found on their fees, or, if need were, by the fees themselves; so, however, that the proceeding was had regularly by the judgment of the court, and consistent with the reasonable custom thereof. If a lord could distrain his tenants for payment of these reasonable aids, much more, says Glanville, might he make distress for payment of his relief, and for such service as was due to him on

(a) Glanv. lib. 9. c. 4.

account of the fee (a). Thus we see the remedy by distress had, in Glanville's time, become a process first against the chattels; and only *si opus fuerit*, was there recourse to the fee itself; though it is probable, that in the origin of this summary method of compelling tenants to do their services, it was usual to take the whole fee into the lord's hands as a forfeiture, to enable him to do that justice to himself which his tenant refused; but this rigorous proceeding was by degrees softened down to one against the moveables; and only in default of them, against the land.

Administration of justice. Having taken this view of the nature of tenures and estates, it seems necessary to consider the order of administering justice, with the process and modes of proceeding in obtaining redress for any injury to property or to the person; an enquiry not less interesting than the former, as it contains in it the first outline of that course of judicature which prevails, with considerable alterations indeed, at this day. In pursuing this, there will be occasion to notice such parts of the law concerning private rights as have not already been mentioned.

Pleas were divided into *civil* and *criminal*. Criminal pleas were again divided into such as belonged *ad coronam domini regis*, and such as were within the jurisdiction of the sheriff. The pleas belonging to the king's crown were, the *crimen læsæ majestatis*, as the death of the king, or any sedition touching his person or the realm; pleas concerning the fraudulent concealment of treasure trove; pleas *de pace domini regis infracta*; pleas of homicide, burning, robbery, rape, and the *crimen falsi*; all which offences were punished with death, or the loss of limbs. Only the crime of theft was excepted, which was within the cognizance of the sheriff, and determinable in the county court. The sheriff, in like manner, in cases where the lord of a franchise neglected to do justice, had cognizance of *medietate*, as they were then called, *verbera*, and *plagæ*; unless

(a) Glanv. c. 8.

the party complaining added, as he might if he pleased, an allegation, *de pace domini regis infracta*, namely, that it was against the king's peace (a).

Civil pleas were divided in the same way; some being entertained in the king's court, and others in that of the sheriff. In the king's court were determined pleas concerning baronies; that is, manors held of the king *in capite*; pleas concerning advowsons, villenage, dower *unde nihil*; complaints for breach of final concords made in the king's court; questions of homage, reliefs, and purprestures; pleas of debt owing by lay persons, or, as they were called, *placita de debitis laicorum* (b).

The following civil pleas belonged to the sheriff's court: pleas of right to freehold, when the court of the lord or whom the land was held, had made default in determining the right; and questions upon villenage; and these pleas were always commenced by the king's writ.

Besides these, which were all *de proprietate*, there were other pleas *super possessione*, which were decided by recognition of jurors. Of all these we shall speak in their order.

First, of pleas in the king's court, or *curia regis*, as it was then called. When any one, says Glanville, complained to the king or his justices concerning his fee or freehold, if "the matter was such as was proper for that tribunal, or such as the king pleased should be examined there, the party had a writ of summons to the sheriff, directing him to command the wrong doer to restore the land of which he had deforced the complainant; and unless he did, to summon him by good summoners to ap-

(a) In this distinction between the sheriff's jurisdiction and that of the king, we see the reason of the allegation in modern indictments and writs, *vi et armis* of "the king's crown and dignity," "the king's peace," and "the peace;" this last expression being sufficient, after "the peace of the sheriff" had ceased to be distinguished as a separate jurisdiction. Glanville, lib. 1. c. 1, 2.

(b) Glanv. lib. 1. c. 3.

“pear before the king or his justices, at such a day, to
“shew wherefore he refused so to do.” The following

was the form of the writ: *Rex vicecomiti salutem: Præcipe A. quòd sine dilatione reddat B. unam hidam terræ in villâ (naming it) unde idem B. queritur, quòd prædictus A. ei deforceat: et nisi fecerit, summone eum per bonos summonitores, quòd sit ibi coram me vel justitiariis meis in crastino post octabas clausi Paschæ apud (naming the place where the court sat) ostensurus quare non fecerit, et habeas ibi summonitores, et hoc breve. Teste Ranulpho de Glanvilla apud Clarendon(a).*

At the appointed day the party summoned either came or not, or sent a messenger to *essoïn* (b) him, that is, to make an excuse for his not coming. If he neither came, nor sent an *essoïn*, the demandant was to appear in court, and wait his adversary for three days. If he did not appear at the fourth day, and the summoners offered to prove they had duly summoned him, another writ of summons issued, appointing his appearance in fifteen days at least; and this writ required him, as well to answer upon the merits of the complaint, as for his contempt in disobeying the first summons. When three writs in this form had issued, and he neither appeared nor sent any one to *essoïn* him, his land was taken into the king's hands, and so it remained for fifteen days; and if he did not appear within that time, the seisin of it was adjudged to the complainant, nor could the owner have any remedy to recover it, but by writ of right: yet if he appeared within those fifteen days, and was willing to *replevy* the land, he was commanded to come again on the fourth day, and right should be done; when, if he appeared, the seisin was restored. Indeed, if he had appeared at the third summons, and acknowledged

(a) Glanv. lib. 1. c. 6.

(b) *Essonium*, or *Ekonium*, says Spelman: *ex* privativum, et *soing*, cura; ab angustiâ, curâ, vel labore liberare; which is a more probable derivation, than *ἐξομνυσθαι*; though it should signify to excuse by means of an oath; which, to be sure, is the precise nature of an *essoïn*. Vid. Spelm. voce *Essoniare*.

all the former summonses, he would lose the seisin of his land, unless he could produce a writ from the king to the justices, declaring that he had been in the king's service at the time appointed by the court, and commanding that he should not be held as a defaulter, nor suffer as such (a).

If the party denied that he was summoned, he was to swear it *duedecimâ manu*; and at the appointed day, should any of the jurors who were to swear it, fail, or any be lawfully excepted to, and no other put in his place, that very instant the defendant lost the seisin of his land, as a defaulter. If he disproved the summons in the above way, he was, the same day, to answer to the action.

Thus far of appearance and non-appearance: Essoins.
next as to *essoins*. If the party did not appear at the first summons, but sent a reasonable essoin, it would be received: and he might, in like manner, essoin himself three times successively. The causes of excuse, called *essoins*, allowed in the king's court, were many. The principal essoin was that *de infirmitate*. This was of two kinds: one was, *de infirmitate veniendi*; the other, *de infirmitate reseantisæ*; of which the first was called afterwards, *de malo veniendi*; the latter, *de malo lecti*.

If at the first summons the essoin *de infirmitate veniendi* was cast, it was in the election of the complainant, upon his appearing in court, to demand from the *essoniator*, or person who made it, a lawful proof of the essoin, on the very day; or that he should find pledges (b), or make a solemn engagement to bring a warrant or proof of the essoin, that is, the principal summoned, at a day appointed. And in this manner might the tenant be essoined three times successively. If he did not come at the third day, nor send an essoin, the court awarded, that he should appear on another day, in person, or by a sufficient attorney (or *responsalis*, as he was then called), who would be received *ad lucrandum vel perdendum* in his place. If the

(a) Glanv. lib. 1. c. 7, 8.
inveniet, vel fidem dabit.

(b) Glanville's words are, *vel plegium*

party summoned appeared on the fourth day, after three essoins, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the same day was to answer to the action: and if he did not appear at the fourth day, nor send his attorney, his land was taken into the king's hands, as before mentioned. There issued also an attachment against the essoniators *tanquam falsarios*, for not performing the engagement they had made for their principal; and in the mean time the principal was summoned, to shew cause why he did not avow and make good what his essoniator had engaged for in his name: a summons went also against the pledge put in, as above mentioned, by the essoniator, to shew cause why he did not produce the principal to make good the essoin (a).

If the principal appeared within the fifteen days, and was willing to replevy the land, a day was given him; and if he then gave his sureties, he recovered his seisin. If he denied all the summonses, and disproved them *duodecimâ manu*; or if he admitted the first, avowed his three essoins, and on the fourth day produced the above-mentioned writ, testifying that he was in the king's service; he could in that case recover seisin of the land: but if he did not appear within the fifteen days, the seisin was adjudged to the complainant, as before mentioned. The direction in the writ to the sheriff for taking the land in the case of the king was, *capias in manum meam*; and of that for giving possession of it to the complainant was, *seisias M. de tantâ terrâ, &c.*

In the same manner a man might essoin himself three times *de infirmitate reseantisæ*, or *de malo lecti*; and if the party appeared not at the third summons, the judgment of the court was, that it be seen whether the infirmity be a *languor*, or not. For this purpose a writ issued, commanding the sheriff to send four lawful men of his county

(a) Glanv. lib. 1. c. 12, 13, 14, 15.

to view the party: and if they saw that it was *languor*, they were to appoint him to appear, or send his attorney, in a year and a day; but if they thought it not to be a *languor*, they were to appoint a certain day of appearance for him or his attorney, at which time the four viewers were likewise to appear and testify their view. Two essoniators were necessary to make this essoin (a).

Perhaps the first two essoins might be *veniendi*, and the third *de reseantisâ*; in which case, persons were to be sent to view whether *languor* or not: but if the first two were *de reseantisâ*, and the third *veniendi*, they were adjudged as if all were *veniendi*: for it was a rule, always to judge according to the nature of the last essoin (b).

We have seen that the land of a person who did not appear, was taken into the king's hands. It was also the practice, if a person had appeared and answered, and a future day was given, and at that day he neither came nor sent his attorney, that his land should be taken into the king's hands; but Glanville states this material difference, that he could not in this case replevy it; he was also summoned to hear the judgment of the court upon his default: however, whether he appeared or not, he lost his seisin for the first default, unless he could avoid the summons by the before-mentioned writ *de servitio regis*. A person who had answered in court and departed in a lawful way, might recur to the three essoins, unless there was any agreement to waive them.

If a person had essoined himself once, and at the second day he neither came nor essoined himself, we have seen that a writ issued to the sheriff to attach the essoniator *tanquam falsarium*, as before mentioned (c). That the essoniator might be treated with a reasonable fairness, he also was allowed to essoin himself. Thus, if any obstacle happened to retard him in going to essoin his principal, so that he could not get to the court at the appointed day, he

(a) Glanv. lib. 1. c. 18, 19. (b) Ibid. c. 20. (c) Ibid. c. 20, 21.

had till the fourth day, as his principal had ; and if any one came within that time to essoin him, he was received in like manner as the essoniator of the principal (a). The principal might also, if he pleased, send a second essoniator, who was to state to the court the excuse of the principal, that he sent that excuse by an essoniator who was detained by accidents on the road, and that he would prove this as the court should award (b). In all cases of essoins, if the adverse party had departed, upon a day having been given by the essoniator, the appearance of the principal within the fourth day signified nothing : for the day given by the essoniator must still be observed (c).

Thus far of the essoins *de infirmitate veniendi*, and *de infirmitate reseantisæ* ; or, as they have since been called, *de malo veniendi*, and *de malo lecti*. Glanville mentions several others ; as that *de ultra mare* ; upon which the party had at least forty days. Another was, *subita aquarum inundatio*, or the like unexpected accident, which was allowed to save the four days (d). Another was called *per servitium regis* ; and in that case the plea was put without a day, till the party returned from the service he was on : wherefore this was never allowed to those who were constantly in the service of the king, such persons being left to the ordinary course of the court. This essoin *de servitio regis* lay only for persons in the king's service before the plea was commenced. If any went into the king's service after the plea commenced and essoined himself, there was this difference, whether he was there *per mandatum regis ex necessitate*, or *ex voluntate*, without any mandate. In the former case, the above-mentioned order was observed, and the plea was put *sine die* : in the latter, it was not. Another distinction was made, whether the service was *ultra mare*, or *citra mare* : if the former, he had the usual forty days, and was ex-

(a) Glanv. lib. 1. c. 21, 22.

(b) Ibid. c. 23.

(c) Ibid. c. 24.

(d) Ibid. c. 25, 26.

pected at the expiration of them to appear and shew the king's writ, as we have before seen: in the latter, it was at the discretion of the justices to give a less or a greater time, as they thought it best suited the king's service (*a*).

There was an *essoin per infirmitatem*, which infirmity must be such as had happened since the party arrived in the town where the court was. In this case the court ordered, that he should appear the next day, and so on for three days successively; and if he made the same excuse the third day, then four knights were directed by the court to attend and see whether he was able to make his appearance or not: if not, and they testified the same in court, he had a respite for, at least, fifteen days (*b*).

Another *essoin* was *de esse in peregrinatione*. There was a distinction in this case, as in that of the king's service, whether the party had commenced his journey before the suit, or since. If he had been summoned first, the proceeding took its course, as before stated: if not, then there was a difference, whether his journey was towards Jerusalem, or otherways. In the former case, he had a respite of a year and a day, at least; in other cases, the respite lay in the discretion of the justices (*c*).

Having considered the circumstances re-
lating to the tenant's appearance in court, let Of summons.
us pause a while, and look back to the nature of the writ which was to compel this appearance, and the method taken for its execution. The writ of summons had in it this clause addressed to the sheriff, "*et habeas ibi summonitores, et hoc breve:*" in consequence of which the first inquiry, when the demandant offered himself at the appointed day in court, was, whether the sheriff had there the writ and the summoners. If he had, and the summons was proved, they proceeded as before mentioned; but if the sheriff did not appear within the fourth day, (which was allowed also to the tenant) then there issued a

(*a*) Glanv. lib. 1. c. 27.

(*b*) Ibid. c. 28.

(*c*) Ibid. c. 29.

writ *de secundâ summonitione*, directing him to summon the tenant, and to appear himself and shew cause why he did not summon him upon the first writ. This contained the first writ of summons, with the addition of this clause: *et tu ipse sis ibi ostensurus quare illam summonitionem ei non feceris, sicut tibi præceptum fuit per aliud breve meum, et habeas ibi hoc breve, et illud aliud breve*. If the sheriff came at the day, and confessed that he had not executed the writ, he was then, as they termed it, *in misericordiâ regis*, that is, he was amerced; the demandant lost a day without effect, and the tenant was to be summoned again: but if the sheriff averred that he commanded lawful summoners to make the first summons, and they, being present, admitted it, they as well as the sheriff were amerced, if they had not obeyed it. But if they denied that the sheriff gave them charge of the summons, then there was a distinction, whether the sheriff gave it in the county-court or not. Such matters ought, properly, to be transacted in that court; and if the plea was commenced sometime before the county-court, Glanville says, *attachiabitur usque ad comitatum*, and then a complete summons was to be made. If, then, the summoners had been enjoined in the county, and it was so proved, the summoners were amerced; for this was a solemn act, which they would not be allowed to deny: if out of the county, and they denied the command, then the sheriff alone was amerced, for executing the writ in a private and improper manner: for all public acts, such as enjoining summons to be made, taking pledges of prosecuting, and pledges *de stando ad rectum*, ought to be transacted in a public manner, that there might be no debate concerning such prefatory process; a circumstance which would lead to great impediments in suits. If the summoners were not present at the appointed day, but sent their essoniators, who essoined them; and added, that they had properly summoned the party; in that case, the first day was considered as not lost to the demandant, and

the summoners were amerced for not appearing and proving the summons, as was enjoined them, unless they could excuse themselves by the king's writ *de servitio*. It should be remembered, that one or other of the summoners might excuse himself at the first day; and in that case, the first day was not considered as lost to the demandant (a).

Such was the proceeding where the tenant was simply summoned, without any pledges being given. It may be proper to mention in this place, what the process would be, when an *attachment* was necessary. Of attachment. If the suit was of a kind to make it necessary for the tenant to find pledges *de stando ad rectum* for his appearance, (as was the case in pleas for breach of a final concord made before the king or his justices, and for novel disseisin) and these pledges had been recorded in the county court, or before the justices; then if the tenant did not appear, nor essoin himself, the pledges were adjudged to be amerced, and further pledges were required, to engage for his answering to the suit. This was to be done three times; and if he did not come at the third summons, his land was taken into the king's hands, in like manner as before mentioned; and the pledges likewise were amerced, and summoned to appear in court at a certain day, in order to hear the judgment. This was the course of *attachment* in civil causes: but in criminal ones, as in those *de pace domini regis infractâ*, if the party did not appear at the third summons, there issued a *capias* to take the body, the pledges being amerced as in the former cases (b).

Thus far of the default of the tenant. If the demandant did not appear at the first day, he might essoin himself in like manner as the tenant. If he neglected both, the tenant was dismissed *sine die*; so, however, as that the demandant might institute another suit for the same cause of action. But as to this, and the consequence of the tenant's default, there was a diversity of opinions in Glanville's

(a) Glanv. lib. 1. c. 30, 31.

(b) Ibid. c. 31.

time. Some held, that he only lost his first writ, with his costs and expences, but not his action; so that he was at liberty to commence another: others thought he lost his action totally, without any right of recovery; and that he should be amerced for his contempt of court. Others were of opinion, that he lay at the king's mercy, whether he should be admitted to bring his action again. In either case, if the demandant had found pledges *de clamore suo prosequendo*, as was the case in some suits, his pledges were likewise to be amerced. Glanville further adds, that in criminal matters and those relating to the peace, where the king had an interest, as he was bound to prosecute, his body was to be taken, and kept in custody until he prosecuted his appeal: besides which, his pledges were still to be amerced (*a*). If both demandant and tenant were absent at the day, it was in the discretion of the king or his justices to proceed against both; against the tenant for contempt of court, and the demandant for false claim (*b*).

When obedience had been paid to the writs of summons, and both parties were in court, the demandant made his demand of the land in question; and then the tenant might, if he pleased, pray a view of the land. If the tenant had no other land in the same vill, the view was made without delay; but if he had, the tenant was respited, and another day given in court. When he departed in this manner from court, he might claim three essoins; and a writ was directed to the sheriff to send *liberos et legales homines* (not specifying any number) of the vicinage of the vill to view the land in question, and to have four of them to certify their view to the court (*c*).

After the three essoins accompanying the view, and after both parties had appeared in court; then the demandant was to set forth his claim in the following manner: *Peto, &c.* "I demand against *B.* one hide of land in such a vill (naming it), as my right and inheritance, of which

(*a*) Glanv. lib. 1. c. 32. (*b*) Ibid. 33. (*c*) Ibid. lib. 2. c. 1, 2.

“ my father (or grandfather, as it might be) was seised in
 “ his demesne as of fee, in the time of Henry I. (or after
 “ the first coronation of the king, as it might be), and from
 “ which he received produce to the value of fifty shillings
 “ at least (as in corn, hay, and other produce); and this I
 “ am ready to prove by this my free man Counting upon
 “ John: and if any thing should happen the writ.
 “ to him; by him, or him” (for he could name several,
 though only one could wage battle) “ who saw and
 “ heard this.” Or he might conclude in this form: “ and
 “ this I am ready to prove by this my free man John,
 “ whom his father, on his death-bed, enjoined, by the
 “ faith a son owes a father, that if he ever heard of any
 “ plea being moved concerning this land, he would *de-*
 “ *raign* (or prove) this (a), as what his father had seen and
 “ heard (b).” This was the manner in which the demand-
 ant spread out the substance of his writ; and his reliance
 was always upon the testimony *de visu et auditu*.

After the demandant had thus made his The duel.
 claim, it was in the election of the tenant,
 whether he would defend by *duel*, or avail himself of the
 privilege granted by the king’s late statute, and demand that
 a *recognition* should be made, which of the two had the
 greatest right to the land. If he chose the duel, he was to
 defend his right *de verbo in verbum*, as the demandant had
 set it forth; either in person, or by some fit champion. It
 was a rule, that when the duel was once waged, the tenant
 could not claim the benefit of the new law.

After the duel was waged, the tenant might essoin
 himself three times, as for himself; and in addition to
 these, three times in respect of his champion. When all
 these essoins were elapsed, the demandant was to bring his
 champion into court, ready for the engagement: the
 champion was to be the same person, upon whom he put

(a) Glanville’s words are: *Hoc dirationaret, sicut id quod pater suus vidit, et audivit.*

(b) Glanv. 2. lib. c. 3.

the proof in his claim: nor could he put any one in his place after the duel was once waged. If he who waged the duel happened to die, and that was declared by the voice of the vicinage, he might recur to one of the others named in the claim; or even a stranger, if that stranger was qualified to be a proper witness; for that qualification was always required in the champion of the demandant. But this was only where the champion died by a natural death; for if it happened by any fault or neglect of his own, no other could be substituted in his place, and the demandant lost his suit. Glanville states it as a question, whether the demandant's champion himself could nominate any one in his place; and he thought, that by the old and established custom of the realm, he could not appoint any one, except his son born in lawful wedlock.

As we before said, the champion of the demandant must be a person who could be a proper witness of the matter in question *per visum et auditum*; the demandant of consequence could not be his own champion; but the tenant might defend himself, either *in person*, or by another fit champion. If the champion of the tenant died, it was a question what was to be done; whether the tenant might defend himself by some other, or was to lose his suit, or only seisin of the land: Glanville thought it was to be ordered exactly as in case of the demandant's champion dying.

It sometimes happened, that the champion was a person hired for a reward. This was a good cause of exception; and if the adverse party offered to prove it by one who saw the reward given, he was to be heard to this point; and the duel, in the mean time, was deferred. If the champion of the demandant was convicted of this charge, or was vanquished in the duel upon the point of right, the demandant lost his suit, and the champion lost his *legem terræ*; that is, he was never after to be received as a witness to wage duel for any one; though he might in a cause of his own, either as defendant or appellant, in matters of

the peace and of personal injury; he might also defend by duel his own right to a fee and inheritance. In addition to the loss of his law, he was to be fined in the penalty of sixty shillings, *nomine recreantisæ*, on account of his cowardice. If the champion of the tenant was conquered, his principal lost the land in question, with all the fruits and produce found on it at the time of the seisin, and was never to be heard in a court of justice concerning the same; for it was a rule, that whatever was once determined in court by duel, remained ever after fixed and unalterable. There, accordingly, issued a writ to the sheriff, *quodd sine dilatione seisiās M. de unā hidā terræ, &c.—quia ea hida terræ adjudicata est ei in curiā meā per finem duelli*. When the champion of the demandant was conquered, as before mentioned, the tenant was quit-claimed (a) from any right of the demandant to recover against him.

This was the course of proceeding, when the tenant, in a writ of right, chose to defend his right by duel (b). But the tenant might avail himself of the provision lately made by Henry II. and put himself upon the assise; to which the demandant might consent, and put himself also upon the assise.

If the demandant had expressed before the justices in open court (c) his consent to put him-^{Of the assise.}self on the assise, he was not allowed to retract, but must stand or fall by the assise, unless he could shew some good cause why the assise should not pass between them. One cause which might be shewn, was, that they were of the same blood, and descended from the same stock whence the inheritance came. If this was admitted by the other party, the assise was waived, and the question was argued and determined by the court; it being a point of law, which

(a) *Quietus clamabatur de ejus clameo*. (b) *Glanv. lib. 2. c. 4, 5*.

(c) So I construe *coram justitiis in banco sedentibus*, though this phrase has been quoted by some persons to shew that, in the time of Glanville, there were justices *de banco*, in the modern sense of those words; a construction which this passage will certainly not warrant.

was the nearest to the first stock, and the heir with the better title. In this manner the nearest heir obtained the land, unless it could be shewn that he or his ancestor had any way lost it, sold it, made a gift of it, changed it, or by any other means had parted with it; and if the cause was rested upon any of these points of fact, it might be determined, says Glanville, by the duel.

Suppose the person who had put himself on the assise, had denied this impediment of relationship; such a question was tried by calling into court the common relations of both parties. If these agreed unanimously that they were related, it was usual to abide by this declaration; but if one of the litigants still continued to deny it to be so, the last resort was to the vicinage; and if they agreed with the relations, this complete testimony was acquiesced in. Should the relations differ in their testimony, the vicinage was in like manner called in, and their verdict was decisive. If, upon this inquisition being made, it appeared to the court and justices, that the parties were not descended from the same stock, the person who made the exception was to lose his suit. If there was no exception taken, then the assise proceeded, and its determination was as final as that by duel (*a*).

Before we enter on the proceeding of the assise, let us reflect with Glanville upon the nature and design of this innovation upon the old method of trial. "The assise," says that author (*b*), "is a royal benefit conferred on the na-

(*a*) Glanv. lib. 2. c. 6.

(*b*) The words of Glanville are: *Est autem assisa regale quoddam beneficium clementiâ principis, de concilio procerum populis indultum*. I quote this from the last edition of Glanville, adhering to the reading which is warranted by the consent of the *Harleian*, *Cottonian*, and *Bodleian* manuscripts, in opposition to the old printed text, which reads *magna assisa*, &c. an epithet which, I am clear, has been interpolated in this and other passages of Glanville by a later hand at a period when the distinction between the *great assise* and other assises had grown familiar among lawyers. This corruption of the text in so remarkable a passage as the present, has had the effect of establishing a vulgar opinion, that the alteration made by Henry II. related only to the trial in the writ of right; an opinion which is not warranted by the history of this revolution, and which is left without any support, as it should seem, when the concurring testimony of these three MSS. is against the insertion of this epithet in most of the places where it is used.

“tion by the prince in his clemency, by the advice of his
“nobles, as an expedient whereby the lives and interests of
“his subjects might be preserved, and their property and
“rights enjoyed, without being any longer obliged to
“submit to the doubtful chance of the duel. After this
“ (continues he) the calamity of a violent death, which
“sometimes happened to champions, might be avoided,
“as well as that perpetual infamy and disgrace attendant
“upon the vanquished, when he had once pronounced
“the *infestum et inverecundum verbum*.” The horrible
word here alluded to was *craven*; by which the champion
signified that he yielded, and submitted himself to all the
consequences attending such a defeat. “This legal insti-
“tution, says Glanville, is founded in the greatest equity,
“and the fullest desire of doing justice. For a question
“of right, which, after many and long delays, can hardly
“ever be made out by duel, is investigated with dispatch
“and ease, by the benefit of this constitution. The
“assise itself is not clogged with so many essoins as the
“duel. By this the expences of the poor are spared, and
“the labour of all is shortened. In fine, as the credit of
“many fit witnesses has a greater influence in judicial in-
“quiries than that of one only; so this constitution con-
“tains in it more justice than the duel. The duel pro-
“ceeds upon the testimony of one witness only; this con-
“stitution requires the oaths of at least twelve lawful men
“(a).” Such is the manner in which Glanville speaks
of the institution of the assise.

The proceeding by assise was thus: The party who had
put himself upon the assise, sued out a writ *de pace ha-*
benda. This was to prohibit the lord (if the suit was in
the lord’s court) from entertaining any suit, in which the
duel had not been already waged, between the same par-
ties for the same land, because one of the parties had put
himself upon the king’s assise, and had prayed a recogni-

(a) Glanv. lib. 2. c. 7.

tion to be made, who had the most right (a). Upon this, the demandant came to the court, and prayed another writ, whereby four lawful knights of the county might be directed to chuse twelve lawful knights of the vicinage, who should say upon their oaths, which party had most right to the land in question. As this is the first process for the return of jurors, of which we have any mention, it may be proper to insert it at length. It ran in these words: *Rex vicecomiti salutem. Summone per bonos summonitores quatuor legales milites de vicineto de Stoke, quòd sint ad clausum Paschæ coram me vel justitiis meis apud Westmonasterium ad eligendum super sacramentum suum duodecim legales milites de eodem vicineto, qui meliùs veritatem sciant, ad recognoscendum super sacramentum suum utrùm M. aut R. majus jus habeat in unâ hidâ terræ in Stoke quam M. clamat versus R. per breve meum, et unde R. qui tenens est, posuit se in assisam meam, et petit recognitionem fieri, quis eorum majus jus habeat in terrâ illâ, et nomina eorum inbreviari facias. Et summone per bonos summonitores R. qui terram illam tenet, quòd tunc sit ibi auditurus illam electionem, et habeas ibi summonitores, &c.*

At the day appointed the tenant might essoin himself three times; for it was a rule, that as often as either party appeared in court, and did what he was commanded by the law to do, he might again recur to his three essoins. But if this was allowed, the consequence would be, that as many or more essoins would intervene in the proceeding by assise than by duel, which would ill agree with what we have just said about the conciseness of this new method. For suppose the tenant essoined himself three times, on the election of the twelve knights by the four; afterwards, when he appeared in court, some or other of the four knights might essoin himself; and then, after these essoins, the tenant might again essoin himself afresh; so that the assise would hardly ever be brought to any effect: it was

(a) Glanv. lib. 2. c. 8, 9.

therefore necessary to defeat the operation of the above rule, in this instance. A constitution was accordingly passed, enabling the court to make order for removing these obstacles, and expediting the proceeding; in pursuance of which, when the four knights appeared at the appointed day in court, ready to chuse the twelve knights, they were authorized, whether the tenant appeared or not, to proceed to the election. If he had been present, he might make a lawful exception to any of the twelve; and therefore the court would, in his absence, direct more than twelve to be elected, that when he appeared, he might have a greater chance to find twelve unexceptionable jurors. Jurors, says Glanville, might be excepted against in the same manner as witnesses were rejected in the court christian; jurors being in fact only witnesses, and the testimony of witnesses being always considered as a matter of canonical regulation.

So desirous were they of avoiding delay, that upon the tenant appearing, if all the four knights did not appear, yet by the advice of the court, and assent of parties, one of the knights, taking two or three others of the county then in court, though not summoned, might proceed to elect the twelve: though, to avoid all cavil, and in order to have enough to make the election, they usually had the caution to call six or more knights to court. In all such points, the discretion of the court was suffered to govern the established course of proceeding; which, says Glanville, the king or his justices might temper and accommodate to the equity of the case then before them (a).

When the twelve knights were elected, they were summoned by the following writ: *Rex vicecomiti salutem. Summone per bonos summonitores illos duodecim milites, scilicet, A. B. &c. quòd sint die, &c. coram me vel justitiis meis ad, &c. parati sacramento recognoscere utrùm R. vel*

(a) Glanv. lib. 2. c. 12.

N. majus jus habeat in unâ hidâ terræ, quam prædictus R. qui clamat versus prædictum N. et unde prædictus N. qui rem illam tenet, posuit se in assisam nostram, et petit inde recognitionem, quis eorum majus jus habeat in re petitâ; et interim terram illam, unde exigitur servitium, videant: et summe per bonos summonitores N. qui rem ipsam tenet, quòd tunc sit ibi auditurus illam recognitionem. At the day appointed for the knights to make their recognition, no essoin could be cast by the tenant, nor was his presence necessary: as he had once put himself upon the assise, he had now nothing to say why the recognition should not proceed. It was different with regard to the demandant; for if he essoined himself, which he might do, the assise remained for that day, and another day was given: for it was a rule, that though any one might lose by his default of appearance, yet no one should gain any thing if not present in court. *Perdere potest quis propter defaultam, lucrari verò nemo potest omninò absens (a).*

The assise being about to make their recognition, it is next to be considered how they were enabled to do it. Now, some, or all, might know the truth of the matter, or all might be ignorant of it. If none of them knew any thing of the matter, and they testified the same in court, upon their oaths; the court resorted to others, till they found those who did know the truth. If some were acquainted with the fact, and some not, the latter were rejected, and others called in, till twelve at least were found who could agree. Again, if some were for one of the parties, and some for the other, fresh jurors were to be added till twelve were found who agreed in opinion for one of the parties. It is to be observed, that all who were called in, were to swear that they would not speak what was false, nor knowingly be silent as to what was true; and the knowledge they were expected to have of the matter, must have been from what they themselves had seen or heard, or from de-

(a) Glanv. lib. 2. c. 15, 16.

clarations of their fathers, and such evidence as claimed equal credit with that of their own ears or eyes. *Per proprium visum suum et auditum vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis* (a).

When the twelve knights were agreed in the truth, they then proceeded formally to recognise, whether the demandant or tenant had most right in the thing in question. If they said the tenant had most right, or said that which satisfied the king or his justices that he had most right, then the judgment of the court was, that he should go quit of the demandant for ever, so as the demandant should never be heard again in court with effect; for a suit once lawfully determined by the king's great assise, could never be stirred again on any occasion whatever. If the assise were of opinion for the demandant, and the court gave judgment accordingly, then the adversary lost the land in question, with all its fruits and profits found there at the time of the seisin (b).

Upon this there issued a writ of execution, *quòd seisiās N. de unā hidā, &c. quia idem N. dirationavit terram illam in curiā meā per recognitionem, &c.* (c) reciting the mode of trial, as the before mentioned writ of seisin did the duel. We may here notice, that the duel and assise had become so co-extensive in their consequences, as for it to grow into a rule, that the duel should not be where the assise was not allowed, nor the assise where there was no duel (d). Assises lay concerning services, land, demands of service, rights of advowson, and that not only against a stranger, but even against a lord (e).

The regal constitution by which the assise was appointed, had also ordained a punishment for jurors *temerè jurantum*, or who swore falsely. If any were proved, or confessed themselves, guilty of perjury, they were to be spoiled of

(a) Glanv. lib. 2. c. 17. (b) Ibid. c. 18. (c) Ibid. c. 20. (d) Ibid. c. 19. (e) Ibid. c. 13.

all their chattels and moveables, which were forfeited to the crown; but they were permitted by the clemency of the king to retain their freeholds; they were to be thrown into prison, and be there detained for a year at least; they were to lose the *legem terræ*, or, in other words, incur the brand of perpetual infamy (a).

It was a question in Glanville's time, what was to be done, if no knights could be found, of the vicinage or of the county, who knew the truth of the matter; whether the tenant was therefore to prevail, as the person in possession; or the demandant to lose his right, if he had any. Suppose, says he, two or three lawful men, or any other number less than twelve, who were witnesses of the fact, offered themselves in court *ad dirationandum*, and said and did every thing in court proper for the occasion, could they or could they not be heard (b)?

Vouching to
warranty. This was the order of proceeding, when the presence of the tenant only was necessary, and no one else was brought in to answer. There were many cases where it was requisite to call in a third person; as when the tenant declared in court, that the thing in question was not his own, but that he held it *ex commodato*, or *ex locato*, or *in vadium*, that is, in gage or pledge, or committed to his custody, or in some other way intrusted to him by the real owner; or if he should declare the thing was his own, but that he had some one *to warrant* it, as the person who made a gift of it, or sold it, or gave it in exchange: or should he declare in court, that the thing was not his, but belonging to another person, that person was to be summoned by some other similar writ; and so the suit was to be carried on afresh against him. When he appeared in court, he, in like manner, might admit the thing to be his, or not. If he said it was not his, the tenant who had said it was, *ipso facto* lost the

(a) Glanv. lib. 2. c. 19.

(b) Ibid. c. 21.

land without recovery, and was summoned in order to hear the judgment of the court to that effect; and whether he came or not, the adversary recovered seisin.

When the tenant called a person for any of the above reasons *to warrant* the land, a day was given him to have in court his warrantor; and upon this he was entitled to three essoins respecting himself, and three others respecting the person of his warrantor. At length the warrantor appearing in court, he either warranted the land or not. If he would enter into the warranty, the suit was from thence carried on with him, and every thing went under his name, in lieu of the tenant; not but that the tenant, if he had essoined himself, would be considered as a defaulter, if absent. If the warrantor, being present in court, declined entering into the warrant, the suit was to be carried on between the tenant and him; and after allegations on both sides, they might come to the duel, although, perhaps, the tenant might not be able to shew a charter of warranty, but could only produce a fit witness to deraign it. The object of all this was, to prove the warrantor to be bound to the warranty, which would make the tenant entirely safe; for should the land be recovered from him, the warrantor, if able, was bound by law to give him an *excambium*, as they called it, or an equivalent in recompence.

As this was the effect of a warranty when proved, it often happened that a person called to warranty was shy of coming to court: at the prayer of the tenant, therefore, the court would think it adviseable to compel him, by a writ of summons *ad warrantizandum* (a).

At the day appointed, this person, like all others who were summoned to appear in court, might essoin himself three times. At the third essoin the court would award, that at the fourth appointed day he, or some attorney for him, should appear; but if he did not, there seems to have been a doubt what should be done to punish the con-

(a) Glanv. lib. 3. c. 1, 2, 3.

tempt: for if the land in question was taken into the king's hands, this would seem unjust to the tenant, who had not been adjudged in default; and yet if it was not done, there seemed to be a want of justice to the demandant, whose suit was delayed. Indeed Glanville thought, that, notwithstanding these reasons, the law and custom of the realm required the land to be taken; for no hardship would fall on the tenant; it being a rule, that wheresoever a person lost his land through the default of his warrantor, the warrantor should make him a recompence in value (*a*).

It sometimes happened, that a tenant neglected to call in the person on whom he had a claim of warranty, and defended the right himself. In this case, if he lost it, he could have no recovery against his warrantor. It was by some made a question, whether, upon the same principle as the tenant might defend his right by duel without the assent and presence of his warrantor, he might put himself upon the king's great assise without his assent and presence; but Glanville thought that the same reason should prevail in both cases (*b*).

A suit was sometimes impeded by the absence of lords; as when the demandant claimed the land as belonging to the fee of one, and the tenant as belonging to the fee of another lord. In this case, each lord used to be summoned to appear in court, that the plea might be heard and determined in their presence, lest any injury might otherwise be done to their rights. The lords when summoned might essoin themselves three times, as was usual in other cases. If the lord of the tenant had had his three essoins, and the court had directed him to appear, or send his attorney, and he made default, the judgment then was, for the tenant to answer and take upon him the defence: and if he prevailed, he retained the land, and for the future did his suit and service to the king, the lord having lost it by his default, till he appeared and did as the law required. In the same manner the lord of the demandant might essoin himself three

(*a*) Glanv. lib. 3. c. 4.

(*b*) Ibid. c. 5.

times; and if, after that, he absented himself, it was Glanville's opinion, that his essoniators and the person of the demandant should be attached for contempt of court, and in that manner be compelled to appear (*a*).

When the two lords had appeared, and the lord of the tenant said that the land was in his fee, he might take upon him the defence of the suit, or intrust it to the tenant; and in either case, should they prevail, their several rights were secured: but if they lost the suit, the lord lost his service, as well as the tenant his land, without any recovery. If the tenant's lord, being present in court, failed of the warranty, and the tenant maintained that he was bound to the warranty, because he or his ancestors had done such and such service to him or his ancestors, as lords of that fee; and he could produce those who had heard and seen this, or a proper witness to deraign it, or other fit and sufficient proof, as the court should award: if the tenant could say this, then he and the lord might interplead with each other (*b*). If the demandant's lord entered into the warranty, and they failed in the suit, the lord in like manner lost his service. But the fate of the demandant was different from that of the tenant, if his lord would not enter into the warranty; for he was amerced for his false claim (*c*).

Thus has the reader been conducted through the proceeding in a writ of right, with all its incidents and appendages, when prosecuted for the recovery of land. This relation has been somewhat long and minute; but as it contains in it, with some small alteration, the scheme of process and proceeding in most other actions, it was indispensably necessary to trace it with some exactness. After this, the remainder of our enquiry into the course of judicial remedies will be more easy, and the matter will be more various and entertaining. We shall now proceed to speak of other

(*a*) Glanv. lib. 3. c. 6.

(*b*) Ibid. c. 7.

(*c*) Ibid. c. 8.

methods of recovering property : and first of advowsons.

Writ of right of advowson. An action for the advowson of a church might be brought either while the church was full, or when it was vacant. If the church was vacant, and any one obstructed the person who thought himself the patron, in presenting a clerk, and claimed the presentation to himself, there was a difference to be made, whether the contest was for the advowson; that is, upon the *right* of presenting; or upon the *last presentation*, that is, the *seisin* of the right of presenting. If it was upon the last presentation, and the person claiming it said, that he or some ancestor of his made the last donation or presentation; then, says Glanville, the plea is to be conducted according to the late ordinance (a) about the advowsons of churches; and an assise was summoned to make recognition *what patron, in time of peace, presented the last deceased person to the church*: of which assise more will be said, when we come to speak of other recognitions. For the present it will be enough to remark, that he who recovered by such an assise, recovered seisin of the presentation so as to present a proper person, with a saving of the demandant's claim as to the right of the advowson.

If the right of advowson only was demanded, the demandant must add something as to the last presentation, either that "he or one of his ancestors had it;" or that the tenant or one of his ancestors had it, or that some stranger had it, or that he was ignorant who had it. Whichsoever of these allegations it might be, if the other party claimed the last presentation as his own or his ancestor's, the recognition was, notwithstanding, to proceed upon the right of presenting, except only in one of the above-mentioned

(a) Perhaps Glanville here alludes to the famous statute about assises; or, from the expression, it seems more probable, a statute had been ordained since that, which directed recognitions to be made in case of last presentations. It is not unlikely, that the many assises which grew into use in the time of Henry II. were introduced at different times, according as this mode of proceeding was recommended by experience of its benefits.

cases; that was, where the demandant admitted that the tenant, or one of his ancestors, had the last presentation; for then, without going to the recognition, he was to present at least one person. When, however, the last presentation had been decided (a) by the assise, as before mentioned, or in any other lawful way, and a person was presented accordingly by the successful party; then the party who was resolved to try the right of advowson might go on with the suit, and have the following writ (b): *Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione dimittat R. advocacionem ecclesiæ in villâ, &c. quam clamat ad se pertinere, et unde queritur quòd ipse injustè ei deforceat: et nisi fecerit, summane per bonos summonitores eum quòd sit die, &c. ibi coram nobis vel justitiis nostris, ostensurus quare non fecerit, &c.* (c)

The person summoned had the same essoins as were before mentioned in a plea of land; and if, after these, he did not appear at the fourth appointed day in person, or by attorney, Glanville thought the next process was for taking into the king's hands seisin of the presentation. The sheriff was to execute his writ of *capias in manu* in the following way: he was to go to the church, and there declare publicly, in the presence of some honest men, that he seised the presentation into the king's hands: the seisin remained in the king's hands fifteen days, with a liberty to the tenant to replevy it within the fifteen days, as was before stated (d). In short, after all the essoins were run out, if one or both the parties absented themselves, the course was ordered as in a plea of land.

When both parties appeared in court, the demandant propounded his right in these words: *Peto, &c.* "I demand the advowson of this church as my right, and appertaining to my inheritance, of which I (or one of my ancestors) was seised (in the time of Henry I. or) since

(a) *Dirationata.*
ant. 114.

(b) Glanv. lib. 4. c. 1.

(c) Ibid. c. 2. Vid.

(d) Ibid. c. 3, 4, 5.

“ the coronation of the king ; and being so seised, I presented a person to that church (at one of the before-mentioned times) ; and so presented him, that he was instituted parson according to my presentation : and if any one will deny this, I have here some honest men (a) who saw and heard it, and are ready to prove it (b), as the court shall award ; and particularly this A. and this B.” (c).

When the claim of the demandant was thus set forth, the tenant might defend himself by the duel, or put himself upon the assise ; and in both cases it would be ordered as before mentioned (d).

This was the manner of contesting a right of advowson when the church was vacant. It might also be contested when the church was full ; as if the parson, or he who called himself parson, in the church claimed his title by one patron, and another claimed the advowson, the latter might then have the following writ against the parson : *Rex vicecomiti salutem. Summone per bonos summonitores clericum illum M. personam ecclesiæ, &c. quòd sit coram me vel justis meis apud Westmonasterium ad diem, &c. ostensurus quo advocato se tenet in ecclesiâ illâ, cujus advocationem miles ille M. ad se clamat pertinere. Summone etiam per bonos summonitores ipsum N. qui advocationem illi deforceat, quòd tunc sit ibi, ostensurus quare advocationem ipsam ei deforceat, &c.* (e)

If the clerk did not appear according to the summons, nor send any to essoin him ; or if after the three essoins he did not come, or send his attorney ; Glanville thought, that having no lay fee by which he might be distrained the bishop (or his official, in case the see was vacant) should be commanded to distrain him, or punish his default by taking the church into his hands, or using some other lawful means of compulsion (f).

(a) *Probos homines.*(b) *Dirationare.*(c) *Glanv. lib. 4. c. 6.*(d) *Ibid. c. 7.*(e) *Ibid. c. 8.*(f) *Ibid. c. 9.*

When the clerk appeared in court, he would, perhaps, admit the demandant to be the patron, and would say, that he was instituted upon his presentation, or that of some of his ancestors; if so, the plea went on no farther in the king's court; for if the demandant denied the presentation, he was to maintain this controversy with the clerk before the ecclesiastical judge. Perhaps the clerk said the advowson belonged to the party summoned: now such party was dealt with in this manner: If he came at none of the three summonses, nor sent any essoin; or having essoined himself, neither came nor sent his attorney at the fourth day; the advowson of the church in question was seised into the king's hand, and so it remained for fifteen days; and if he did not appear in those fifteen days, then seisin thereof was given to the demandant. In the mean time, it was a question, what was to be done with the clerk, whether he was *ipso facto* to lose his church, or not. But supposing the party summoned appeared, and disclaimed all right in the church, the suit in the king's court ceased, and the patron and clerk contested their claims in the court christian. Should the church happen to become vacant *pendente lite*, Glanville thought, if there was no question but that, the person against whom the right of advowson was demanded, had the last presentation, either in himself or his ancestors, that he should be allowed to present a clerk, at least till he had lost the seisin: consistently with which he thought, that should a vacancy happen while the advowson was in the king's hands for fifteen days, the patron did not lose that presentation. If the party summoned should say the right of advowson was his, it was tried, as we before said of land. If he prevailed, he and his clerk were freed from the claim of the demandant; if he failed, he and his heirs lost the advowson for ever (a).

When the right of advowson was in this manner determined, it became a question what was to be done with the

(a) Glanv. lib. 4. c. 9.

clerk, who admitted in court that he had the incumbency of the church by presentation of the unsuccessful party. As the king's court could proceed no further than the right of advowson between the two patrons, the party who had now recovered the advowson was to proceed against the clerk before the bishop, or his official: yet after all, if at the time of the presentation the person presenting was believed to have been the patron, he was left in possession of the church during his life; for in the reign of this king, at the Council at Clarendon, a statute had been made concerning clerks who had enjoyed churches by the presentation of patrons *pro tempore*, which ordained, that clerks who had violently intruded themselves into churches during time of war, should not lose such livings during their lives (a). This provision salved the titles of many beneficed clerks at that time. Nevertheless, in such case, after the incumbent's death, the presentation returned to the lawful patron (b).

The following points might arise upon what has been said concerning the right of advowson and the last presentation. When a patron had recovered an advowson by de-rainment in court, and afterwards, in process of time, the parson died; it might be asked, whether the patron against whom the advowson had been recovered, could maintain an assise *de ultimâ præsentatione*; and what answer could, in that case, be given to it by the adverse party. For suppose the person bringing the assise had not, but some of his ancestors had had the last presentation; and it was objected to him, that he ought not to have a recognition, because he had lost the advowson to the tenant in the assise, by a solemn judgment of the court, whether this would be a bar to the assise? It should seem, says Glanville, that it would; because, as he had not the last presentation, he never had seisin of the advowson: but, it should seem, says he, that

(a) Vid. ant. p. 54, 55.

(b) Glanv. lib. 4. c. 10.

he might well go upon the seisin of his father, notwithstanding what had been determined respecting the right of advowson. And yet if a question could be thus started upon the last presentation, it looks like invalidating the judgment of the king's court, before given, upon the right of advowson; for when that had been solemnly adjudged, it should hardly seem that he ought by law to recover any seisin, particularly as against him who had before recovered the advowson, unless some new cause had arisen which would intitle him to be heard again. Indeed, if an assise was summoned for that purpose, it would be barred by this answer to it: that the complainant or his ancestors had, it was true, the last presentation; but if he or his ancestors had any right, they lost it by a solemn judgment in court: and this being proved by the record of the court, the suit would be lost, and the complainant amerced (a).

We have just seen that questions about presentations belonged to the bishop's court, though the right of advowson was cognizable only in the king's court. It sometimes happened, that when one clerk sued another clerk in the court christian, they claimed a church by two different patrons. One of these patrons, not chusing to have a question upon his right agitated before that tribunal, might pray a writ *to prohibit* the court from proceeding, till the right of advowson was decided in the king's court. As this is the first mention we have of a ^{Of prohibition to the ecclesiastical court.} prohibition to the ecclesiastical court, it may be proper to give this writ at length. It was as follows: *Rex judicibus, &c. ecclesiasticis salutem. INDICAVIT nobis R. quòd cum J. clericus suus teneat ecclesiam, &c. in villâ, &c. per suam præsentationem, quæ de suâ advocacione est, ut dicit, N. clericus eandem petens ex advocacione M. militis, ipsum J. coram vobis in curiâ christianitatis inde trahit in placitum. Si verò præfatus N. ecclesiam illam dirationaret ex advocacione prædicti M. palàm est quòd jam dictus*

(a) Glanv. lib. 4. c. 11.

R. jacturam inde incurreret de advocacione suâ. Et quoniam lites de advocacionibus ecclesiarum ad coronam et dignitatem meam pertinent, vobis prohibeo, ne in causâ illâ procedatis, donec dirationatum fuerit in curiâ meâ, ad quem illorum advocatio illius ecclesiæ pertineat, &c. If they proceeded in the cause after this prohibition, then the judges were summoned to appear in the king's court by the following writ (a): *Rex vicecomiti salutem. Prohibe iudicibus, &c. ne teneant placitum in curiâ christianitatis de advocacione ecclesiæ, &c. unde R. advocatus illius ecclesiæ queritur quod N. inde eum traxerit in placitum in curiâ christianitatis; quia placita de advocacionibus ecclesiarum ad coronam et dignitatem meam pertinent. Et summe per bonos summonitores ipsos iudices, quod sint coram me vel iustis meis die, &c. ostensuri quare placitum illud tenuerunt contra dignitatem meam in curiâ christianitatis. Summe etiam per bonos summonitores præfatum N. quod tunc sit ibi ostensurus quare præfatum R. inde traxerit in placitum in curiâ christianitatis, &c.*

The next action that demands our attention, is that in which questions concerning a man's condition or state were agitated; as when one claimed a person to be his villain; or when one in a state of villenage claimed to be a free man. When one claimed a man who was before in villenage, as his villain *nativus*, he had a writ *de nativis* directed to the sheriff; and so contested before the sheriff the matter with the other who was then in possession of the villain. If the question of villenage or not villenage was not moved before the sheriff, then the plea *de nativis* went on, as will be more fully shewn presently. But if the villain said he was a free man, and he gave pledges to the sheriff that he would demonstrate it, then the suit in the county court ceased, because the sheriff was not allowed to determine that point; and if the sheriff persisted in going on to hear the cause, the villain was

(a) Glanv. lib. 4. c. 13.

to make his claim to the justices, and would then obtain the king's writ, as follows: *Rex vic. &c. Questus est mihi R. quòd N. trahit eum ad villenagium de sicut ipse est liber homo, ut dicit. Et ideo præcipio tibi, quòd si idem R. fecerit te securum de clamore suo prosequendo, tunc PONA S loquelam illam coram me vel justitiis meis die, &c. et interim eum pacem inde habere facias: et summane per bonos summonitores prædictum N. quòd tunc sit ibi ostensurus quare trahit eum ad villenagium injustè, &c.* It may be remarked, that this is the first writ of *pone* we have yet met with (a).

The person who claimed the party as his villain, was also summoned by the same writ, and a day was fixed for him to prosecute his claim. At the day appointed, if the villain did not come nor send a messenger or essoin, they then proceeded as we before mentioned in pleas (b) where attachment lay. If he who claimed the party to be his villain neither came nor sent, the other was dismissed the court *sine die*. In the mean while, he who was claimed by both parties as his villain, was put, as Glanville expresses it, into *seisin of his freedom* (c); that is, as in pleas of land, a seisin of the land in question was given as a process of contempt; so in this instance, an inchoate temporary possession of his freedom was given to the villain, till the parties could appear in court, and the question of right was fairly heard and determined.

If both parties appeared in court, the freedom was to be made out in the following way. The person who claimed to be free, was to bring into court his nearest relations, descended from the same stock with himself; and if their freedom was recognised and proved in court, this was construed in his favour, so as to free him from the yoke of servitude. But if the free state of those who were produced was denied, or there was any doubt concerning it, recourse was had to the vicinage, and according to their verdict it was adjudged by the court. In short, if there arose any

(a) Glanv. lib. 5. c. 1, 2. (b) *Per plegios attachiatis.* Vid. ant. 121.

(c) Glanv. lib. 5. c. 3.

doubt concerning the declarations of the relations, every doubt or difficulty of this kind was to be solved by the vicinage (a).

When the freedom of the party was, by one or other of these ways, fairly made out, he was immediately released from the claim, and was adjudged free for ever. But if he failed in his proof, or if he was proved by the adversary to be a villain *nativus*, he was accordingly adjudged to belong to his lord, together with all his goods and chattels. There was the same form and course of proceeding in case of a supposed villain claiming his freedom, and a freeman being claimed as a villain. The person whose freedom was in question applied for a writ, to bring the suit into the king's court, and then it went on as has just been stated. It must be remarked, that the duel was not allowed in a suit to prove a man free *à nativitate* (b).

Writ of right
of dower.

The next action that comes under our consideration, is the remedy a woman had to recover her dower. On the death of the husband, the dower, if it was a parcel of land named and specified, was either vacant or not. If it was vacant, the widow, with the assent of the heir, might take possession thereof, and hold herself in seisin. If part of it only was vacant, she might take possession of that, and for the remainder she might have her writ of right directed to her warrantor, that is, the heir of the husband. The writ was as follows: *Rex M. salutem. Præcipio tibi quòd sine dilatione plenum rectum teneas A. quæ fuit uxor E. de unâ hidâ terræ in villâ, &c. quam clamat pertinere ad rationabilem dotem suam, quam tenet de te in eâdem villâ per liberum servitium decem solidorum per annum pro omni servitio, quam N. ei deforceat. Et nisi feceris, vicecomes faciat, ne oporteat eam amplius inde conqueri pro defectu recti, &c.* (c)

In pursuance of this writ, the plea went on in the lord's court, till proof was made of that court's failure in doing

(a) Glanv. lib. 5. c. 4.

(b) Ibid. c. 4.

(c) Ibid. lib. 6. 4, 5.

justice; upon which it was removed to the county court, and so to the king's court, if it seemed proper to him or his chief justice. The writ to remove it into the king's court was a *pone*, and was as follows: *Rex vicecomiti salutem. Pone coram me vel justitiis meis die, &c. loquelam quæ est in comitatu tuo inter A. et N. de unâ hidâ terræ in villâ, &c. quam ipsa A. clamat versus prædictum N. ad rationabilem dotem suam. Et summane per bonos summonitores prædictum N. qui terram illam tenet, quòd tunc sit ibi cum loquelâ, &c. (a).*

This plea, as well as some others, might be removed from the county court to the *curia regis*, for many causes; as well on account of doubts which might have arisen in the county, and which they did not know how to decide upon (and on such cause of removal both parties were to be summoned) as at the prayer of one of the parties; and then it was sufficient, if only the party not removing it was summoned. If the suit was removed by the assent and prayer of both parties, being present in court, then there needed no summons, for both of them must know the day appointed.

If either, or both parties were absent at the day appointed, they proceeded as before mentioned. When both parties appeared, the widow set forth her claim in the following words: *Peto, &c.* "I demand that land, as appertaining to such land which was named for me in dower; of which my husband endowed me *ad ostium ecclesiæ*, on the day he espoused me, as that of which he was invested and seised at the time when he endowed me." To this claim the adverse party might make various answers: he might deny or admit that she was endowed of the land. But whatever the answer given, the suit ought not to proceed without the widow's warrantor, that is, the heir of the husband; he was therefore summoned by

(a) Glanv. lib. 6. c. 6, 7.

the following writ: *Rex vicecomiti salutem. Summone per bonos summonitores N. filium et hæredem E. quòd sit coram me vel justitiis meis eâ die, &c. ad warrantizandum A. quæ fuit uxor ipsius E. patris sui unam hidam terræ in villâ, &c. quam clamat pertinere ad rationabilem dotem suam de dono ipsius E. viti sui versus N. et unde placitum est inter eos in curiâ meâ si terram illam ei warrantizare voluerit, vel ad ostendendum ei quare id facere non debet, &c.* If the heir did not appear nor essoin himself, and was in contempt, there was a doubt what was the precise way for compelling him. Some thought, he was to be distrained by his fee; others thought, he was to be attached by pledges (a).

If the heir, when he appeared, admitted what the widow alleged, he was bound to recover the land against the tenant in possession, and deliver it to the widow; and for this purpose the suit was continued between him and the tenant. If he declined prosecuting the suit, he was bound to give her an equivalent in recompence; for in all events the widow was to be no loser. If he denied what was alleged by the widow, the suit went on between him and her; and if she could produce those who heard and saw the endowment at the church-door, and was ready to deraign it against the heir, the matter might be decided by the duel: and if she prevailed, he must in that case also deliver to her the land in question, or a sufficient equivalent. It was a rule, that no woman could maintain any suit concerning her dower without her warrantor (b).

Dower unde nihil. This was the course for a widow to take, when she was obliged to sue for part of her dower: but when she could get possession of no part of it, and was put to sue for the whole, the suit was commenced originally in the *curia regis*, and the person who withheld her dower was summoned by the following writ, called a writ of dower *unde nihil habet*: *Rex vicecomiti*

(a) Glanv. lib. 6. c. 8, 9, 10.

(b) Ibid. c. 11.

salutem. Præcipe N. quòd justè et sine dilatione faciat habere A. quæ fuit uxor E. rationabilem dotem suam in villâ, &c. quam clamat habere de dono ipsius E. viri sui, UNDE NIHIL HABET, ut dicit; et unde queritur quòd ipse ei injustè deforceat: et nisi fecerit, summane eum per bonos summonitores quòd sit die, &c. coram nobis vel justitiis nostris, ostensurus quare non fecerit, &c. Whoever was in possession of the land, whether the heir, or any other person, the presence of the heir, as was above laid down, was always necessary. If a stranger was in possession, he was summoned by this writ, and the heir by the above writ of summons *ad warrantizandum* (a). The suit between the heir and widow might be varied, according as the heir pleased. If she claimed a certain assigned dower, he might deny any assignment, or deny that to be the land assigned. In both cases the proceeding was as above described. If only a reasonable dower was demanded, a third part was to be allotted her by the heir (b). If more was assigned to her than a third part, a writ might be had directed to the sheriff, commanding him to admeasure it (c).

(a) Glanv. lib. 6. c. 14, 15, 16. (b) Ibid. c. 17. (c) Ibid. c. 17, 18.

CHAP. IV.

WILLIAM THE CONQUEROR TO JOHN.

*Of Fines—Of Records—Writ de Homagio recipiendo—
 Purpresture—De Debitis Laicorum—Of Sureties—
 Mortgages—Debts ex empto et vendito—Of Attornies
 —Writ of Right in the Lord's Court—Of Writs of
 Justicies—Writs of Replevin—and of Prohibition—Of
 Recognitions—Assisa Mortis Antecessoris—Exceptions
 to the Assise—Assisa Ultimæ Præsentationis—Assisa
 Novæ Disseisinæ—Of Terms and Vacations—The
 Criminal Law—Of Abjuration—Mode of Prosecution
 —Forfeiture—Homicide—Rape—Proceeding before
 Justices Itinerant—The King and Government—The
 Charters—The Characters of these Kings as Legisla-
 tors—Laws of William the Conqueror—Of the Sta-
 tutes—Domesday Book—Glanville—Miscellaneous
 Facts.*

Of fines.

WE have hitherto been speaking of compul-
 sory methods of recovering and confirming
 rights; but it often happened, as Glanville expresses it,
 that pleas moved in the king's court were determined by
 an amicable composition and final concord: this was al-
 ways by the consent and licence of the king or his justices;
 and was done as well in pleas of land as other pleas. Such a
 concord used sometimes, by the assent of parties, to be re-
 duced into a writing of several parts: from one of these was
 the agreement rehearsed before the justices in open court;
 and, in the presence of the justices, there was given to each
 party his part, exactly agreeing with the other's. The fol-
 lowing is a specimen of such an instrument, literally translat-
 ed from one in the reign of Henry II. "This is a final con-
 cord made in the court of our lord the king, at Westmin-

“ster, on the vigil of the blessed Peter the apostle, in the
 “thirty-third year of the reign of Henry II. before Ranulph
 “de Glanvillâ, justiciary of our lord the king, and before
 “H. R. W. and T. and other faithful and trusty persons of
 “our lord the king, then there present; between the prior
 “and brethren of the hospital of St. Jerusalem, and W. T.
 “the son of Norman, and Alan his son, whom he appoint-
 “ed as attorney in his stead in the court of our lord the
 “king, *ad lucrandum et perdendum* respecting all the land
 “which the said W. held, with its appurtenances, except
 “one oxland and three tofts. Of all which land (except the
 “said oxland and three tofts), there was a plea between
 “them in the court of our lord the king; to wit, that the
 “said W. and Alan concede and attest and quit-claim all
 “that land from them and their heirs to the hospital and
 “aforesaid prior and brethren for ever, except the said ox-
 “land and three tofts, which remain to the said W. and
 “Alan, and their heirs, to be held of the said hospital, and
 “the aforesaid prior and brethren, for ever, by the free
 “service of four-pence *per ann.* for all service; and for
 “this concession and attestation and quit-claim, the afore-
 “said prior and brethren of the hospital have given to the
 “said W. and Alan an hundred shillings sterling(a).”

A concord or agreement of this kind was called *final*(b),
 because *finem imponit negotio*; so that neither of the
 parties could recede from it. If one of the parties did not
 perform what he was thereby bound to do, and the other
 party complained of it; the sheriff would be commanded
 to put him by safe pledges, so as that he appeared before
 the king's justices, to answer why he did not keep the fine;
 that is, if the complainant had previously given security
 to the sheriff for prosecuting his claim. The writ was as
 follows: *Præcipe N. quòd justè et sine dilatione teneat*
finem factum in curiâ meâ inter ipsum et R. de unâ hidâ
terræ in villâ, &c. unde placitum fuit inter illos in curiâ

(a) Glanv. lib. 8. c. 1, 2. (b) Vid. ant. 92.

mea: et nisi fecerit, et prædictus R. fecerit te securum de clamore suo proseguendo, tunc pone eum per vadium et saluos plegios, quòd sit coram me vel justitiis meis, ostensurus die, &c. quare non fecerit, &c. (a)

If he did not appear, nor essoin himself; or after the three essoins, if he did not appear, nor send his attorney, they were to proceed as was before shewn in case of suits prosecuted by attachments. When they both appeared in court, if both parties acknowledged the writing containing the concord; or if the concord was stated to be such by the justices before whom it was taken, and this was testified by their record; then the party who had broke it was to be in the king's mercy, and to be safely attached till he gave good security to perform the concord in future; that is, either the specific thing agreed on, if it was possible; or otherwise, in some instances, what was equivalent: for it was invariably expected of every one who had acknowledged or undertaken any thing in the king's court, in presence of him or his justices, ever after to observe such acknowledgment and undertaking. Moreover, had the final concord been made in a plea of land, then he who was convicted of breach of the fine, if tenant of the land, was *ipso facto* to lose the land. If one or both the parties denied the chirographum, then the justices were to be summoned to appear and *record*, says Glanville, in court the reasons why such a plea, between such parties of such land, ceased; and, if the parties came to a concord and agreement by their assent, what the form of that concord was. As to the method of making this record, there was this difference observed between a concord made in the king's chief court and that before the justices itinerant: if in the latter, then the justices were summoned, that they, with certain discreet knights of the county where the concord was made, who were present at making the concord, and

(a) Glanv. lib. 8. c. 3, 4.

knew the truth of the matter, should appear in court, there to make a record of the plea. Accordingly a writ to that effect was directed to the sheriff to summon the justices and knights (a). Besides this, the sheriff of the county where the plea had been, was commanded to have the record of the plea then before the king or his justices by four discreet knights of the county. This is the first mention we have of the writ of *recordari*, so named from the words of it: *Præcipio tibi quoddam facias RECORDARI in comitatu tuo loquelam, &c.* (b) When the justices appeared, and had agreed upon the record, that record was to be abided by, neither party being allowed to make any exception to it; only, if such doubts should arise, which there was no possibility of removing, then the plea might be recommenced, and proceeded in afresh (c).

Having said thus much of records of courts, Of records. it may be proper on this occasion to inquire a little further concerning these muniments of judicial proceedings. No court had, generally and regularly, such remembrances of its proceedings as were called and esteemed records, except the king's court, that is, as it should seem, the court where the king's justices sat; though, by what we have just related, it should seem that the justices itinerant had not *regularly* a court of record. In other courts, if anyone had said that which he would not willingly own, he might be permitted to deny it, in opposition to the whole court, by the oaths of three persons, affirming that he never said it; or by more or less, according to the custom of different courts.

In some special instances, however, county and other inferior courts had records; and that, as we are informed by our great authority Glanville, by virtue of a law made by the council of the realm (d). Thus, if in any inferior

(a) Glanv. lib. 8. c. 5, 6.

(b) Ibid. c. 6, 7.

(c) Ibid. c. 8.

(d) When this law was made, we do not know; nor is it mentioned any where, that I know of, but in this passage of Glanville.

court duel was waged, and afterwards the plea was removed into the king's court, then the claim of the demandant, the defence of the tenant, the form of words in which the duel was awarded and waged; of all these the court had a record, which was acknowledged as such by the king's court. But it had a record of nothing else, except only of the change of a champion: for if, after the removal of the plea into the king's court, another champion than he who had waged duel in the inferior court was produced, and a question arose upon it; in this case also it was decided by the record of the inferior court, according to the direction of the statute before alluded to. Besides, any one might object to the record of an inferior court, declaring that he had said more than was now to be found in the record; and that what he had so said he would prove against the whole court by the oaths of two or more lawful men, according as the usage of the court required; for no court was bound either to maintain or defend its record by duel; this, therefore, was the only proof that could be had. We are informed by Glanville, that a particular law (a) had been made, ordaining, that no one should except to a record *in part*, and admit the remainder; though he might deny *the whole* by oath, as just stated (b).

The king might occasionally confer on any court the privilege to have a *record*. Thus, upon some reasonable cause being shewn, he might, as has just been observed, direct a court to be summoned *to make a record* of a matter for the inspection of his own court; so that, if the king pleased, there could be no contradiction admitted to such record. It often happened that a court was summoned to have the record of some plea before the king or his justices, although it had, in truth, no such record. In this case, the parties, by admission and consent, might settle a re-

(a) Of this law also, and the time when it was made, there is no remembrance but this slight intimation.

(b) Glanv. lib. 8. c. 9.

cord of the matter between them. The writ on this occasion used to be of the following kind: *Rex vicecomiti salutem. Præcipio tibi quòd FACIAS RECORDARI in comitatu tuo loquelam quæ est inter A. et B. de terrâ, &c. in villâ, &c. et habeas recordum illius loquelæ coram me vel iustitiis meis ad terminum, &c. per quatuor legales milites, qui interfuerunt, ad recordum id faciendum. Et summane per bonos summonitores A. qui terram illam clamat, quòd tunc sit ibi cum loquelâ suâ, et B. qui terram illam tenet, quòd tunc sit ibi ad audiendum illud, &c.* (a)

Again, inferior courts had occasionally records of what was done there, which were transmitted to the king's court: as when a lord had a plea in his court of some doubt and difficulty, which could not be well determined there, then he might *curiam suam ponere in curiam domini regis*, as they called it, or adjourn the matter into the king's court, to have the advice of that tribunal what was proper to be done; an assistance which the king owed to all his barons. When a lord was in this manner certified what was adviseable to be done, he returned with the plea, and proceeded to determine upon it in his own court. County courts had a record of pledges, or sureties taken there, and of some few other matters (b).

We before said, that courts were not bound to defend their records by duel; but they were obliged to defend their *judgments* in that manner: as if any one should declare against a court for passing a *false judgment* against him, and should state it to be *therefore* false, because when one party said thus, and the other answered thus, the court gave a false judgment thereon in such and such words, and passed that judgment by the mouth of N. and should conclude, that if it was denied, he was ready to prove it by a lawful witness there ready to deraign it; in this case, the question might be decided by the duel. But there were some doubts whether the court was to defend its

(a) Glanv. lib. 8. c. 9, 10.

(b) Ibid. c. 11.

judgment by one of its own members, or by some stranger. Glanville seems to have been of the former opinion; for he says, the defence was to be by the person who passed the judgment. If the court was convicted in this manner, the lord of the court was in the king's mercy, and lost his court for ever; and besides this, the whole court was in the king's mercy (a).

Writ de homagio recipiendo. We shall now speak of the remedy the law allowed to compel a lord to receive the homage of his tenant, and so enable him to claim the protection consequent thereon (b). If a lord would not receive the homage of the heir, nor a reasonable relief; then the relief was to be kept ready, and to be repeatedly tendered to the lord by good men: and if he would not at any rate accept it, the heir might complain of him to the king or his justices, upon which he would have this writ: *Præcipe N. quòd justè et sine dilatione recipiat homagium et rationabile relevium K. de libero tenemento quod tenet in villâ, &c. et quòd de eo tenere clamat. Et nisi fecerit, summane, &c.*

The process against the defendant was the same as has often been mentioned before in cases of summons. If he appeared and acknowledged the complainant to be the heir, and confessed he had tendered his homage and relief, he was to receive it instantly, or appoint a day for doing it. The same was to be done, if he denied the tender, but admitted the complainant to be the heir; but if he denied he was the heir, then the heir, if he was out of seisin, might have an assise against the lord *de morte antecessoris*; if he was in seisin, he might hold himself in, till it pleased the lord to accept his homage; for the lord was not to have the relief, till he had accepted homage. But if the lord doubted whether he was the lawful heir or not, and it had appeared

(a) Glanv. lib. 8. c. 9.

(b) We have before seen how important it was for the heir that the lord should receive his homage. Vid. ant. 123.

to the vicinage, that he was not, the lord might then take the land into his own hands, till it was made appear whether he was the heir. And this was the way in which the king always dealt with his barons: for the king, upon the death of a baron holding of him in chief, immediately retained the barony in his own hands, till the heir gave security for the relief; and this, notwithstanding the heir was of full age (a).

Lords might defer receiving homage and relief, upon reasonable cause shewn; as suppose some other person than the heir pretended a right to the inheritance, or any part of it; for while that suit depended, he could not receive homage or relief. Another cause was, when the lord thought he had a right to hold the inheritance in demesne. In such case, if he commenced a suit by the king's writ, or that of his justices, against the person in seisin of the land, the tenant might put himself upon the king's great assise, which proceeded much in the way we before stated, as will appear by the following writ: *Rex vicecomiti salutem. Summone per bonos summonitores quatuor legales milites de vicineto villæ, &c. quòd sint coram me vel justitiis meis die, &c. ibi, ad eligendum super sacramentum suum duodecim, &c. qui melius rei veritatem sciant, et dicere velint, ad faciendam recognitionem, utrùm N. majus jus habet tenendi unam hidam terræ in villâ, &c. de I. vel ipse R. tenendi eam in dominico suo, quam ipse R. petit per breve meum versus prædictum N. et unde N. qui terram illam tenet, posuit se in assisam meam, et petit recognitionem fieri, utrùm ille majus jus habeat tenendi terram illam in dominico, vel prædictus N. tenendi de eo. Et summone per bonos summonitores prædictum N. qui terram illam tenet, quòd tunc ibi sit auditurus illam electionem, &c.* (b)

If a lord could not, by distress or otherwise, compel his tenant to render his services and customs legally due; recourse was then had to the king or his chief-justice,

(a) Glanv. lib. 9. c. 4, 5, 6.

(b) Ibid. c. 6, 7.

from whom he might obtain the following writ to the sheriff, directing that he himself should see justice done to the complainant; which is the first instance we have yet mentioned of the form of a writ of *justicies*. *Præcipio tibi quòd JUSTICIES N. quòd justè et sine dilatione faciat R. consuetudines et recta servitia quæ ei facere debet de tenemento suo quod de eo tenet in villâ, &c. sicut rationabiliter monstrare poterit eum sibi deberi, ne oporteat eum amplius inde conqueri pro defectu recti, &c.* In pursuance of this writ, the sheriff, in his county court, held a plea of the matter in question, and the party complaining might therein recover his services and dues, according to the custom of the county. If he made out his right, the other party, besides rendering what was due, was in the mercy of the sheriff; for the *misericordia* or *amercement* which arose out of any suit in the county court, always went to the sheriff. The *quantum* of this was ascertained by no general law, but depended on the custom of different counties, and the opinion of the persons who assessed it (*a*).

Purpresture. Next, as to the remedy to be pursued in case of *purprestures*. *Purpresture*, or according to Glanville *porpresture*, was, when any unlawful encroachment was made upon the king; as intruding on his demesnes, obstructing the public ways, turning public waters from their course, or building upon the king's highway (*b*): in short, whenever a nuisance was committed upon the king's freehold, or the king's highway, a suit concerning such nuisance belonged to the king's crown and dignity. These *purprestures* were inquired of either in the chief court of the king, or before the king's justices, who were sent into different parts of the kingdom for the purpose of making such inquisitions, by a jury of the country, or of the vicinage (*c*). Who-soever was convicted by a jury of having committed such *purprestures*, was in the king's mercy for the whole fee he

(*a*) Glanv. lib. 9. c. 8, 9, 10.
juralam patriæ sive vicinæ.

(*b*) *Regiam plateam.*

(*c*) *Per*

held of the king, and was obliged to restore what he had incroached upon. If the purpresture consisted in building in some city upon the king's street, the edifice, says Glanville, so built, was forfeited to the king, and the party remained in the king's mercy. The *misericordia domini regis*, which has been so often mentioned, is explained in this passage by Glanville to be, when any one is to be amerced by the oaths of twelve lawful men of the vicinage; so, however, *ne aliquid de suo honorabili contenmento amittat*, as not to lose his countenance, or appearance in the world. When any purpresture was committed against a private person, it was considered in a different way. If it was against the lord of the fee, and not within the provisions of the statute about assises, then the transgressor was made to appear in the lord's court, provided he held any tenement of him. This was by the following writ: *Rex vicecomiti salutem. Præcipio tibi quòd justicies N. quòd sine dilatione veniat in curia I. domini sui, et ibi stet ei ad rectum de libero tenemento suo quod super eum occupavit, ut dicit, ne oporteat, &c.* (a) If, upon this writ, he was convicted of the purpresture in the lord's court; he lost, without recovery, the freehold he held of the lord.

If he held no freehold of the lord, then the lord might implead him by a writ of right in the court of the chief lord. In like manner, if any one committed a purpresture upon a person not his lord, and the fact did not come within the provision about assises, he might be impleaded in a writ of right. But if it was within that law, then there should be a recognition upon the novel disseisin to recover seisin; of which proceeding we shall have occasion to speak more hereafter. In these purprestures it usually happened, that the boundaries of lands were broke in upon and confounded; upon which, at the prayer of any of the neighbours, the following writ might be issued: *Rex vicecomiti salutem. Præcipio tibi quòd justè et sine*

(a) Glanv. lib. 9. c. 11, 12.

dilatione facias esse rationabiles divisas inter terram R. in villâ, &c. et terram Ade de Byri sicut esse debent, et esse solent, et sicut fuerunt tempore regis Henrici avi mei, unde R. queritur quòd Adam injustè, et sine iudicio, occupavit plus inde quàm pertinet ad liberum tenementum suum de Byri; ne ampliùs inde clamorem audiam pro defectu justitiæ, &c. (a)

We have hitherto treated of the remedies in use for vindicating a right to land, and its appendant services and profits. We shall now take leave of this subject for a while, and consider the nature of personal contracts; such as buying, selling, giving, lending, and the like; upon which there arose *debts* and obligations to pay. This subject is intitled, in the language of this period, *De debitis laicorum*, to distinguish it from those debts and dues that were recoverable in the ecclesiastical courts, as being things of a supposed spiritual nature; such as money due by legacy, or upon promise of marriage (b).

Pleas, therefore, *de debitis laicorum* belonged to the king's crown and dignity. If any one complained to the *curia regis* of a debt owing to him, which he was desirous should be inquired of in that court, he had the following writ of summons: *Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione reddat R. centum marcas quas ei debet, ut dicit, et unde queritur quòd ei deforceat. Et nisi fecerit, summone eum per bonos summonitores, quòd sit coram me vel justitiis meis apud Westmonasterium, à clauso Paschæ in quindecim dies, ostensurus quare non fecerit, &c.* This was the form of the writ of debt.

The manner of enforcing an appearance to this writ, was as in other cases of summons. It should be observed here, that it was not usual for the *curia regis* in any case to compel obedience to a writ by distraining the chattels; therefore, even in a plea like this, the defendant might be

(a) Glanv. lib. 9. c. 13, 14. (b) For this vide Fleta, p. 131.

distraigned by his fee and freehold, or, as in some other suits, by attachment of pledges (a).

When they were both in court, then it was to be considered how the demand arose. This might be of various kinds; as *ex causâ mutui*, upon a borrowing; *ex causâ venditionis*, upon a sale; *ex commodato*, upon a lending; *ex locato*, upon a hiring; *ex deposito* (b), upon a deposit; or by some other cause by which a *debt* arose: for, at this time, all matters of personal contract were considered as binding, only in the light of *debts*; and the only means of recovery, in a court, was by this action of debt.

A debt arose *ex mutuo*, when one lent another any thing which consisted in number, weight, or measure. If a person, upon such a lending, received back again more than he lent, it was usury; and if he died under the reputation of an usurer, we have seen the infamy with which his memory was stained. A thing was sometimes lent *sub plegiorum datione*; that is, some one was surety for the restoration of it; sometimes, *sub vadii positione*, that is, a pledge was given; sometimes, *sub fidei interpositione*, when a bare promise was made for the return; sometimes, *sub chartæ expositione*, when a charter was made acknowledging such lending; and sometimes with all these securities together.

When any thing was owing *sub plegiorum datione* only, if the principal debtor had not where-
Of sureties.
 withal to pay, recourse was had to the sureties by the following writ: *Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione acquietet R. de centum marcis versus N. unde*

(a) Glanv. lib. 10. c. 1, 2, 3.

(b) It is almost unnecessary to remark, that these expressions are all borrowed from the civil law: the same may be said of the definitions hereafter given of these different obligations; but, notwithstanding this, the matter of Glanville's discourse upon the subject of debts and obligations bears no resemblance to the imperial jurisprudence. This is one strong and very remarkable circumstance to shew, that the use made of the Roman law by our old writers was not to *corrupt*, but to adorn and elucidate our municipal customs. Vide Inst. lib. 3. tit. 15.

eum applegiavit, ut dicit, et unde queritur quod eum non acquietavit inde. Et nisi fecerit, summone eum per bonos summonitores, &c. (a) If the sureties appeared in court, and confessed the suretyship, they were then obliged to pay the debt at certain times affixed in court, unless they could shew that they were released from their engagement, or had in some way satisfied the demand. Sureties, if more than one, were held to be severally bound for the whole (unless there had been some special agreement to the contrary), and they were both to be proceeded against for satisfaction: therefore, should any of them be insufficient, the remainder were to be answerable for the deficiency. If the sureties, however, had specially engaged for particular parts of the payment, it was otherwise. There might arise a dispute between the creditor and the sureties, or between the sureties, upon this point. In like manner, if some of the sureties engaged for the whole, and some for parts only, then the former would have a question to debate with the latter. In what manner all these points were to be proved, will be seen presently. When the sureties had paid what was due, they might resort to the principal by a new action of debt, as will be shewn hereafter. However, it should be remarked, if any one had become surety for a person's appearance in a suit, and he had fallen into the king's mercy for the default of the principal, he could not recover by action of debt against the principal what he had so paid; for it was a rule, that should any one become surety, for a person's answering in the king's court, in any suit belonging to the king's crown and dignity, as for breach of the peace, or the like, he fell into the king's mercy, if he did not produce the principal; but he was thereby, notwithstanding, released from the en-

(a) This writ was, in after-times, called *de plegiis acquietandis*, and used to be brought by the sureties against the principal debtor; though in the time of Glanville we find it lay for the creditor against the surety. F. N. B. It must be confessed, the wording of it in Glanville seems more adapted to the modern than the ancient application of the writ.

gagement, as a surety, and therefore there could be no further proceeding instituted thereon (a).

If some of the sureties denied they were sureties, and some confessed it, then the question would be, as well between the creditor and the sureties, as between the sureties themselves. There was a doubt what should, in this case, be the mode of proof; whether by duel, or whether the sureties were to deny their engagement by the oaths of such number of persons as the court should require. Some thought that the creditor himself, by his own oath, and that of lawful witnesses, might make proof of it against the sureties, unless the sureties could avoid his oath by any lawful objection: and if so, says Glanville, they must resort to the duel (b).

Things were lent sometimes *sub vadii positione*; and then either moveables, as chattels, or immoveables, as land, tenements, and rents, were given in pledge. A pledge was given either at the time of lending, or not. It was given, sometimes for a certain term, sometimes without any fixed term, sometimes in *mortuo vadio*, sometimes not. *Mortuum vadium*, or mortgage, was, when the fruits, or rent arising therefrom, did not go towards paying off the demand for which it was pledged. When moveables were pledged, and seisin thereof, as it is called, given to the creditor for a certain term, the law required that he should safely keep it, without using it so as to cause any detriment thereto; and if any detriment happened to it within the term appointed, it was to be set off against the debt, according to the damage sustained. If the thing pledged was such as necessarily required some expense and cost, as to be fed or repaired, perhaps there would be some agreement between the parties about it, and that agreement was to be the rule of such contingent expenses. It was sometimes agreed, that if the pledge

(a) Glanv. lib. 10. c. 3, 4, 5.

(b) Ibid. c. 6.

was not redeemed at the term fixed, it should remain to the creditor, and become his property. If there was no such agreement, the creditor might quicken the redemption by the following writ: *Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione acquietet, &c. quam invadiavit R. pro centum marcis usque ad terminum qui præteriit, ut dicit, et unde queritur quòd eam nondum acquietavit: et nisi fecerit, &c.* (a)

It was doubted by Glanville, in what manner the defendant was to be compelled to appear to this writ; whether he was to be distrained by the pledge itself, or in what other way. This, it seems, was left to the discretion of the court; and might be effected, either by that or some other method. He ought, however, to be present in court before the pledge was quit-claimed to the creditor, for he might be able, perhaps, to shew some reason why it should not. If he then confessed his having pledged the thing, as he thereby in effect confessed the debt, he was commanded to redeem it in some reasonable time; and if he did not, the creditor had licence to treat the pledge as his own property. If he denied the pledging, he must either say the thing was his own, and account for its being transferred out of his possession, as lent or intrusted to him; or deny it to be his; and then the creditor had licence to consider it as his own property. If he acknowledged it was his, but denied the pledge and debt both; then the creditor was bound to prove both: and the manner of proof, where pledges denied their suretyship, we have before mentioned. But the debt could not be demanded before the expiration of the term agreed upon (b).

If the pledge was made without mention of any particular term, the creditor might demand his debt at any time. When the debt was paid, the creditor was bound to restore the pledge in the condition he received it, or

(a) Glanv. lib. 10. c. 8.

(b) Ibid. c. 8.

make satisfaction for any injury that it had received: for it was a rule, that a creditor was to restore the pledge, or make satisfaction for it; if not, he was to lose his debt (a).

When it happened, that a debtor did not make delivery of the pledge at the time of receiving the thing lent, Glanville doubts what remedy there was for the creditor, as the same thing might be pledged, both before and after, to several persons; for it must be observed, says our author, that it was not usual for the *court of our lord the king* to give protection to, or warrant private agreements about giving or receiving things in pledge, or about other matters, if made out of court, or if made in other courts than *that of our lord the king*: and therefore, when such conventions were not observed, the *curia regis* would not entertain any suit for the establishment of them. The debtor, therefore, could not be put to answer about the priority of pledging; and (b) the person who was the loser by it, must content himself with the consequence of his own negligence.

When a thing immoveable was put in pledge, Mortgages. and seisin thereof given to the creditor for a certain term, it was generally agreed between them whether the rents and profits should, in the mean time, go towards the discharge of the debt, or not. An agreement of the first kind was considered as just and binding; the latter as unjust and dishonest, and was the *mortuum vadum*, or *mort-gage* before mentioned. Though this was not wholly prohibited by the king's court, yet it was reputed as a species of usury, and punishable in the way before mentioned. In other respects, the rules of law respecting this pledge were the same as those before stated in the case of a moveable, when pledged. It must be added, that should the debtor pay the debt, and the creditor still detain the pledge, the debtor might have the following writ to the sheriff: *Præcipe N. quodd justè et*

(a) Glanv. lib. 10. c. 8.

(b) Ibid. c. 8.

sine dilatione reddat R. totam terram illam in villâ, &c. quam ei invadiavit pro centum marcis ad terminum qui præterit, ut dicit, et denarios suos inde recipiat; OR, quam ei acquietavit, ut dicit: et nisi fecerit, summane eum per bonos, &c.(a)

The creditor, upon his appearance in court, would either acknowledge the land to be given in pledge, or would claim to hold it in fee. In the first instance, he ought to restore it, or shew a reasonable cause why he should not. In the second, it was put either at the prayer of the creditor or debtor, upon the recognition of the country, whether the creditor had the land in fee, or in pledge; or whether his father or any of his ancestors was seised thereof, as in fee or in pledge, on the day he died; and so the recognition might be varied many ways, according as the demandant claimed, or the tenant answered to that claim. But if a recognition was prayed by neither party, the plea went on upon the right only(b).

If the creditor by any means lost his seisin, whether through the debtor or through any one else, he could not recover seisin by any judgment of the court, nor by a recognition of novel disseisin; but if he was disseised of his pledge unlawfully, and without judgment of any court, the debtor himself might have an assise of novel disseisin: and should he have been disseised by the debtor himself, he had no way of getting possession again but through the debtor; for he must resort to the principal plea of debt, to compel the debtor to make him satisfaction(c).

Thus far of proving a debt by sureties and by pledge; but where the creditor had neither of these to prove his demand, nor any other proof, but only the faith or promise of the debtor, this was held no sufficient proof in the king's court; but he was left, says Glanville, to his suit in the court christian *de fidei læsione vel transgressione*, for breach of promise. Though the ecclesiastical judge might take cognizance of this as a criminal matter, and inflict a

(a) Glanv. lib. 10. c. 8, 9.

(b) Ibid. c. 10.

(c) Ibid. c. 11.

penance upon the party, or enjoin him to make satisfaction; yet we have seen, that he was prohibited by one of the Constitutions of Clarendon, to draw into that jurisdiction, and determine questions concerning lay-debts or tene-ments, upon pretence of any *promise* having been made respecting them (a).

If then the creditor had neither sureties nor pledge, he was driven to find some other proof. He might make out the matter either *per testem idoneum*, *per duellum*, or *per cartam*, i. e. by a fit witness, or by the duel, or by a charter. If the debtor's charter or that of his ancestor was produced, and he did not acknowledge it, he might controvert it several ways. Perhaps he might admit it to be his seal, but deny that the charter was made by him or with his assent; or he might deny the charter and seal both. In the first case, if he acknowledged publicly in court the seal to be his, so great regard was had to a seal, that he was thereby considered as having acknowledged the charter itself, and was bound to observe the covenants therein contained; it being his own fault, if he suffered any injury for want of taking care of his own seal. In the latter case, the charter might be proved in the duel by a fit witness, particularly by one whose name was inserted as a witness in the charter. There were other ways of establishing the credit of a charter; as by shewing other charters signed with the same seal, which were known to be the deeds of the person who denied this; and if the seals, upon comparison, appeared exactly the same, it was held as a clear proof; and the party against whom it was to operate lost his suit, whether it related to debts, land, or any other matter: and he was moreover to be *in misericordia* to the king; for it was a general rule, that when a person had said any thing in court or in a plea which he again denied, or which he could not warrant, or bring proof of, or which he was compelled

(a) Glanv. lib. 10. c. 12. Vid. ant. 78.

to gainsay by contrary proof, he always remained in *misericordia*. If a person had given more securities than one for a debt, they might all be resorted to at once; otherwise many securities would not be of more benefit than one (a).

We have hitherto been speaking of lending and borrowing; we come now to a debt arising *ex commodato*: as if one lent another a thing *without any gratuity*, to use, and derive a benefit from it; when that use and benefit was attained, the thing was to be restored without detriment; but if the thing perished, or was damaged in his keeping, a recompence was to be made for the damage sustained: but how this damage was to be valued, and if the thing was lent for a certain term, or to be used in a certain place, how a recompence was to be made, should he exceed that term and deviate from that place; or how that excess was to be proved, or whose property the thing was to be considered, Glanville signifies his doubts; only as to the property, he thought that retaining the thing beyond the stated time and place could not well be called *furtum*, or stealing; because he had possession of it originally through the right owner. Glanville also doubted, whether the owner, if he had any use for it himself, might demand his thing so lent before the time was expired, or before any breach of the agreement as to the place (b).

Next as to debts arising *ex empto et vendito*. A sale was considered as effectually completed when the price was agreed upon, so as there was a delivery of the thing sold, or the price paid, in part or in the whole, or that at least earnest was given and received. In the first two cases, neither of the contracting parties could recede from the bargain, unless on a just and reasonable cause; as if there had been an agreement at first that either might declare off within a certain time; for in this case, the rule of law operated, that *conventio vincit legem*. Again, if the thing

(a) Glanv. lib. 10. c. 12. (b) Ibid. c. 13.

was sold as sound and without fault, and afterwards the buyer could prove the contrary, the seller was bound to take it back; however, it would be sufficient if it was sound at the time of the contract, whatever might afterwards happen: but Glanville had a doubt within what time complaint was to be made of this, particularly where there was no special agreement about it. Where earnest was given, the purchaser might be off his bargain, upon forfeiting his earnest: but if the seller, in this case, wanted to be off, Glanville doubted whether he might, without paying some penalty, for otherwise he would be in a better condition than the purchaser; though it was not easy to say what penalty he was to pay. In general, all hazard respecting the thing sold was to rest with him who was in possession of it at the time, unless there was some special agreement to the contrary (a).

In all sales of immoveables, the seller and his heirs were bound to warrant the thing sold to the purchaser and his heirs, and upon that warranty he or his heirs were to be impleaded, in manner as we before stated. And if any moveable was demanded by action against the purchaser, as being before sold or given, or by some other mode of transfer conveyed to another (so as no felony was charged to have been committed of it), the same course was observed, says Glanville, as in case of immoveables: but if it was demanded of the purchaser *ex causâ furtivâ*, he was obliged to clear himself of all charge of felony, or call a person to warrant the thing bought. If he vouched a *certain* warrantor to appear within a reasonable time, a day was to be fixed in court. If the warrantor appeared, but denied his warranty, then the plea went on between him and the purchaser, and they might come to the decision of the duel. Glanville made a question, whether such a warrantor might call another warrantor; and if so, what limit was to be set to this vouching to warranty. In this case of calling a

(a) Glanv. lib. 10. c. 14.

certain warrantor, when a thing was demanded *ex causâ furtivâ*, the warrantor used not to be summoned, as in other cases of warranty; but on account of the particular nature of this charge, he was attached by the following writ to the sheriff: *Præcipio tibi, quòd sine dilatione attachiari facias per salvos et securos plegios N. quòd sit coram me vel iustitiis meis die, &c. ad warrantizandum R. illam rem quam H. clamat adversus R. ut furtivam, et unde prædictus R. eum traxit ad warrantum in curiâ meâ, vel ad ostendendum quare ei warrantizare non debeat, &c. (a)*

This was the proceeding if he called a *certain* warrantor, whom he could name. But if, in the phrase of that time, he called an *uncertain* warrantor; that is, if he merely declared that he bought the thing *de legitimo mercatu suo*, fairly and honestly, and could produce sufficient proof thereof, he was cleared of the charge of felony, as far as he might be affected criminally; not so, however, but that he might lose the thing in question, if it was really stolen, though not by the defendant. This was the method of proceeding, if any of these special circumstances arose; but if it rested upon the mere debt, that is, whether *ex empto*, or *ex commodato*, it was made out by the general mode of proof used in court, namely, says Glanville, that by writing or by duel (*b*).

A debt *ex locato* and *ex conducto* accrued, when one lett out a thing to another for a certain time, at a certain reward; here the person letting was bound to impart the use of the thing letten, and the hirer to pay the price. In this case, the former might, at the expiration of the time, take possession of the thing letten by his own authority solely: but Glanville made it a question, whether, if the price was not paid according to the agreement, he might deprive the hirer of possession by his own authority? But all these being what were then called private contracts, lying in the knowledge of the parties only, without any evidence to testify

(a) Glanv. lib. 10. c. 15, 16.

(b) Ibid. c. 17.

their existence, were such, as was before observed (a), of which the king's court did not usually take cognizance: others, which were *quasi privatæ*, hardly met with more consideration from the king's court (b). This seems to have been a remarkable part of the jurisprudence of these times; and to have stood in need of the improvement afterwards, though very slowly, adopted, in actions upon promises.

Thus have we gone through those actions which were commenced originally in the *curia regis*; all which were called actions *de proprietate*. As these might be attended by the parties themselves, or by their attornies, it seems proper in this place to say something upon the law respecting attornies. These pleas, as well as some other civil pleas, might be prosecuted by an attorney; or, as he was called in those times, *responsalis ad lucrandum vel perdendum*. A person, when he appointed such *responsalis*, or attorney, ought to be present, and make the appointment in open court before the justices sitting there upon the bench; and no attorney ought to be received otherwise than from the principal then in court; though it was not necessary that the adverse party should be present at the time, nor even the attorney, provided he was known to the court. One person might be appointed attorney, or two, jointly, or severally; so as if one was not present to act, another might; and by such an attorney, a plea might be commenced and determined, whether by judgment or by final concord, as effectually as by the principal himself. It was not enough that any one was appointed bailiff or steward for the management of another's estate and affairs, to intitle him to be received as his attorney in court; but he must have a special authority for that particular purpose, to act in that particular cause, *ad lucrandum vel perdendum* for him in his stead. It was the practice to appoint in the *curia regis* an attorney to act in

(a) Vid. ant. 163.

(b) Glanv. lib. 10, c. 18.

a cause depending in some other court; and there then issued a writ of the following kind, commanding the person appointed to be received as such: *Rex vicecomiti* (or whoever presided in the court) *salutem: Scias quòd N. posuit coram me* (or, *justitiis meis*) *R. loco suo ad lucrandum vel perdendum pro eo in placito, &c. quod est inter eum et R. de unâ carucatâ terræ in villâ, &c.; et ideò tibi præcipio quòd prædictum R. loco ipsius N. in placito illo recipias ad lucrandum vel perdendum pro eo, &c.* (a)

When a person was appointed attorney, he might cast essoins for the principal (and for him only, not for himself) till his appointment was vacated. When an attorney was appointed, and had acted in a cause, Glanville puts a question, whether his principal could remove him at his pleasure and appoint another, particularly if there had arisen any great disagreement between them? And he thought that the principal had that power; an attorney being put in the place of another, only in his absence: and the practice was to remove an attorney at any part of a cause, and appoint another in court, in the form above-mentioned (b).

A father might appoint his son his attorney, an instance of which we saw in the fine above stated, and so *vice versâ*; and a wife might appoint a husband. When a husband acted as attorney to his wife, and lost any thing in a plea of *maritagium* or dower, or gave up any right of the wife's, whether by judgment or final concord; it was made a question by Glanville, whether the wife could afterwards institute any suit for it, or was bound, after her husband's death, to abide by what he had done? And it should seem, says he, that she ought not, in such case, to lose any thing by the act of her husband; because, while she was *in potestate viri*, she could not *contradict* him, or *contravene* his acts; and therefore could not, unless he pleased, attend to her own property and concerns: and yet, adds

(a) Glanv. lib. 11. c. 1, 2.

(b) Ibid. c. 3.

our author, it might be said on the other side, that whatever is transacted in the king's court ought to be held firm and inviolable (a). Abbots and priors of canons regular used to be received as attornies for their societies, of course, without letters from their convent: other priors, whether of canons or monks, if they were cloistered, even though they were aliens, were never received in court without letters from their abbot or chief prior. The master of the Temple and the chief prior of the hospital of St. John of Jerusalem were received of themselves; but no inferior persons of their order. When one or more were appointed attornies in the above manner, it was made a question by Glanville, whether one might appoint his colleague to act for him, or some third person, *ad lucrandum vel perdendum* (b).

The principal might be compelled to fulfil every thing that was done by his attorney, whether by judgment or final concord; though it was settled, beyond a question or doubt, that upon the default or inability of the principal, the attorney was not liable (c). When it is said, that the principal must be present in court to appoint his attorney, it must be remembered what was before laid down; namely, that if a tenant did not appear after the third essoin, but sent an attorney, such attorney should be received: but this was allowed for the necessity of the thing, as he was compelled by the judgment of the court, or by process of distress, to put some one in his place *ad lucrandum vel perdendum*.

The foregoing writs of right were commenced directly and originally in the *curia regis*, and were there determined. There were some writs of right which were not brought there originally, but were removed thither, when it had been proved that the court of the lord where they were brought, had *de recto defecisse*, as it was called, or failed in doing justice between the parties; and, in that case,

(a) Glanv. lib. 11. c. 3.

(b) Ibid. c. 5.

(c) Ibid. c. 4.

such causes might be removed into the county court, and from thence into the *curia regis*, for the above reason (a).

Writ of right in the lord's court. When, therefore, any one claimed freehold land, or service, held of some other person than the king, he had a writ of right directed to his lord, of whom he claimed to hold the land, to the following effect: *Rex comiti W. salutem. Præcipio tibi, quòd sine dilatione teneas plenum rectum N. de decem hidis terræ in Middleton, quam clamat tenere de te per liberum servitium fædi unius militis pro omni servitio. Et nisi feceris, vicecomes de Northampton faciat, ne ampliùs inde clamorem audiam pro defectu justitiæ, &c.* The form of these writs was capable of infinite variety, according to the subject and circumstances of the demand (b). Glanville says nothing upon the order and course of conducting these pleas in the lord's court, except intimating that they depended on the custom of the particular court (c) where they were brought.

The way of proving a court *de recto defecisse*, to have failed in doing justice, was this: The demandant made his complaint to the sheriff in his county court, and there shewed the king's writ: upon this the sheriff sent some officer of his to the lord's court, on the day appointed by the lord for the parties to appear, that he, in the presence of four or more lawful knights, who were to be present by the sheriff's command, might hear and see the demandant make proof that the court *de recto defecisse*: this proof was to be by his own oath, and the oaths of two others swearing with him to the fact. By this solemnity were causes removed out of many courts into the county court, and were there heard over again, and finally determined, without the lord or his heirs being allowed to make any claim for recovery of their judicature, as far as concerned that cause. Should a cause be removed before it had been proved in the above manner that there was a

(a) Glanv. lib. 12. c. 1.

(b) Ibid. c. 3, 4, 5.

(c) Ibid. c. 6.

failure of justice, the lord might, on the day appointed for hearing the cause, make claim of cognizance, and for restoration of his court; but this was never done in the *curia regis*, unless he had claimed it three days before, in the presence of lawful men; it not being suitable to the dignity of that court to be ousted, upon slight grounds, of the cognizance of a cause once entertained there. If no day was appointed in the lord's court, and therefore proof of failure of justice could not be made in the above way, the complainant might *falsare curiam*, falsify the court, or deprive it of its cognizance, by making that proof any where within the lord's fee, if the lord did not reside usually there; for though a lord could not hold his court without his fee, he might by law have it any where within it; if he did reside there, it was, probably, to be made at his mansion-house (a).

The writ of right, of which we have just spoken, was to be directed to the lord, of whom the demandant claimed to hold immediately; not to the chief lord. But it might sometimes happen that the demandant claimed to hold the thing in question of one lord, and the tenant claimed to hold of another: in this case, because one lord should not be enabled to dispossess another of his court and franchise, the suit of necessity belonged to the county court; and from thence it might be removed to the *curia regis*, where both lords might be summoned, and their several rights discussed in their presence, as we before mentioned in cases of warranty (b).

We have said, that the above-mentioned writs of right belonged to the sheriff, upon failure of the lord's court. To the sheriff also belonged several other suits, one of which, namely, that *de nativis* (c), we have already mentioned. In short, all causes where the writ of the king or his justices directed him

Of writs of
justicies.

(a) Glanv. lib. 12. c. 7.

(b) Ibid. c. 8.

(c) Vid. ant. 142.

to do right between the parties (called since writs of *justicies*), and such as contained the provisional clause *quòd si non rectum fecerit, tunc ipse facias, &c.* all these gave the sheriff a judicial authority to hear and determine (a). These writs were very numerous: some of them are mentioned by Glanville, from whom may be extracted a short account, that will give an idea of this provincial judicature. There was a writ directed to a lord, commanding him *ne injustè vexes*, by demanding more services than were due; and unless he desisted, the sheriff was commanded to see right done (b). This is the only provisional writ; the rest are all peremptory, directed to the sheriff solely. One was to give possession of a fugitive villain and his chattels (c); for admeasurement of pasture which was superonerated (d); *quòd permittat habere* certain easements (e); to make *rationabiles divisas* (f); to observe a *rationabilem divisam* of chattels, that had before been made (g); to respite a recognition directed to be taken by the justices (h); a *facias habere rationabilem dotem*; to take care of a deceased man's chattels for payment of his debts (i); and to give possession of chattels that had been taken at a disseisin of the land, after the land had been recovered in an assise of novel disseisin (k). To these we must add writs of *replevin*, and two of *prohibition* to the ecclesiastical court, which deserve to be mentioned more at length.

In the former part of this inquiry into judicial proceedings, we have seen that when land was seised into the king's hand for default or contempt of the tenant, he might within a certain time replevy his land, upon performing what was required of him by the court. The power of distraining, which lords exercised over their tenants, required a similar qualification; either that the tenant should perform what was due; or, at least, till it

(a) Glanv. lib. 12. c. 9. (b) Ibid. c. 10. (c) Ibid. c. 11.
 (d) Ibid. c. 13. (e) Ibid. c. 14. (f) Ibid. c. 16. (g) Ibid. c. 17.
 (h) Ibid. c. 19. (i) Ibid. c. 20. (k) Ibid. c. 18.

was ascertained by judgment, whether any thing, or what was due, he should replevy; that is, have a return of his goods upon pledges given as a security to stand to the award of justice in the matter. In order to effect this, several writs of *replegiare* or *replevin* were devised. One was in this form, and seems to approach nearest to the modern writ of replevin. *Rex vicecomiti salutem. Præcipio tibi, quòd justè et sine dilatione FACIAS HABERE G. AVERIA SUA PER VADIUM ET PLEGIUM; unde queritur, quòd R. EA CEPIT ET DETINET INJUSTE pro consuetudinibus quas ab eo exigit, quas ipse non cognoscit se debere; et ipsum præterea inde justè deduci facias, ne oporteat eum, &c.* (a) The next is in the nature of a prohibition, as well as a writ of replevin; though it is not properly a prohibition, which was always to prohibit a judicial proceeding. It is as follows: *Rex vicecomiti salutem. Prohibeo tibi ne permittas quòd R. injustè exigat ab S. de libero tenemento suo quod tenet de N. de fædo ipsius R. in villâ, &c. plus servitii quàm pertinet ad illud liberum tenementum quod tenet; et AVERIA SUA QUÆ CAPTA SUNT pro illâ demandâ, quam ille non cognoscit ad liberum tenementum suum, quod tenet, pertinere, ei REPLEGIARI FACIAS donec loquela illa coram nobis audiatur, et sciatur utrùm illud servitium debeat vel non, &c.* (b)

To these may be added the two writs of ^{and of prohibition.} prohibition to the ecclesiastical court, just alluded to. *Rex, &c. iudicibus ecclesiasticis salutem. Prohibeo vobis ne teneatis placitum in curiâ christianitatis quod est inter N. et R. de laico fædo prædicti R. unde ipse queritur quòd N. eum trahit in placitum in curiâ christianitatis coram vobis, quia placitum illud spectat ad coronam et dignitatem meam, &c.* (c) Besides this writ to the judges, there went also an attachment against the party suing in the court christian, to the following effect: *Rex vicecomiti salutem. PROHIBE R. ne sequa-*

(a) Glanv. lib. 12. c. 12.

(b) Ibid. c. 15.

(c) Ibid. c. 21.

tur placitum in curiâ christianitatis quod est inter N. et ipsum de laico fædo ipsius prædicti N. in villâ, &c. unde ipse queritur, quòd præfatus R. inde eum traxit in placitum in curiâ christianitatis coram iudicibus illis. Et si præfatus N. fecerit te securum de clamore suo prosequendo, tunc PONE PER VADIUM ET SALVOS PLEGIOS prædictum R. quòd sit coram me vel iustitiis meis die, &c. ostensurus quare traxit eum in placitum in curiâ christianitatis de laico fædo suo, in villâ, &c. de sicut illud placitum spectat ad coronam et dignitatem meam, &c. (a) The manner of ordering the before-mentioned suits in the county-court, depended on the customs of different counties; for which reasons, as well as because it was not strictly within the design of his work, there is no notice in Glanville (b).

Before we leave the subject of writs of right, it will be proper to add some observation respecting the form of writs and of the proceedings thereon. The form of words in which a title to land was stated by the demandant, was called his *petition* (c) or demand, from the word *peto*, with which it begun. It sometimes happened, that the writ contained more or less in it than the *petitio* stated to the court, as to the appurtenances of the land, or particular circumstances of the case. Sometimes there was an error in the writ, as to the name of the party, or the *quantum* of service, or the like. When the writ contained less than the petition, no more could be recovered than was stated in the writ; but when the writ contained more than the petition went for, the surplus might be remitted, and the remainder might well be recovered by the authority of that writ. If, however, there was any error in the name, then by the strictness of law another writ should be prayed: again, when there was an error in stating the *quantum* of service, the writ was lost. Suppose a writ of right, directed to the lord, stated the land to be held by less services than were really

(a) Glanv. lib. 12. c. 22.

(b) Ibid. c. 23.

(c) This term is borrowed from the civil and canon law, where it is used in a similar sense. The *petitio* is called *count* in our law French.

due, Glanville thought that, in such case, the lord could not refuse to receive the writ, and proceed upon it, under pretence of his being concluded thereby, and suffering a detriment to his service; but he was left to make good his claim of service against the demandant, should he recover against the tenant (a). This is all that is to be collected from Glanville on the formal part of *Pleading*; a branch of our law which grew, in after-times, to such a size, and was considered with so much nicety and refinement.

It had become the law and custom of the realm, says Glanville, that no one should be bound to answer in his lord's court concerning his freehold, without the precept or writ of our lord the king, or his chief justice, if the question was about a lay fee; but if there was a suit between two clerks concerning a freehold held in frankalmoigne, or if a clerk should be tenant of ecclesiastical land held in frankalmoigne, whoever might chance to be demandant against him, the plea concerning the right ought, in such case, to be *in foro ecclesiastico*; unless it should be prayed to have a recognition, *utrùm fædum ecclesiasticum sit vel laicum*, whether it was an ecclesiastical or lay fee, of which we shall say more hereafter; for then that recognition, as well as all others, was had in the king's court (b).

We have now dismissed the proceedings for the recovery of *rights*, with all their incidents and appendages, as far as any intimation upon this subject has come down to us. The next thing that presents itself to our consideration, is the method of recovering *seisin*, or mere possession. The remedies for recovery of *seisin* seem to be founded on the policy of preserving peace and quiet in matters of property. As *seisin* was the *prima facie* evidence of right, the law would not allow it to be violated on pretence of any better right; and had provided many ways of proceeding to vindicate the *seisin*, some-

(a) Glanv. lib. 12, c. 22.

(b) Ibid. c. 25.

times in opposition to the mere right. As questions concerning seisin came within the benefit of the late statute of Henry II. to which we have so often before alluded, and were accordingly in general decided by *recognition*, we shall therefore speak of the different kinds of recognitions (a).

One of those recognitions was called *de morte antecessoris*; another, *de ultimâ præsentatione*; another, *utrûm tenementum sit fædum ecclesiasticum vel laicum*; another, whether a person was seised at the day of his death *ut de fædo*, or *ut de radio*; another, whether a person was within, or of full, age; another, whether a person died seised *ut de fædo*, or *ut de wardâ*; another, whether a person made the last presentation to a church by reason of being seised in fee or in ward; and the like questions, which often arose in court between parties; and which, as well by the consent of parties as by the advice of the court, were directed to be inquired of in this way, to decide the fact in dispute. There was one recognition which stood distinguished among the rest, and was called *de novâ desseisinâ*, of novel desseisin (b). We shall speak of all these in their order.

Assisa mortis antecessoris. First, of the recognition *de morte antecessoris*, which seems to be a proceeding particularly calculated for the protection of heirs against the intrusion made by their lords, upon the death of the ancestor last seised. If any one died seised of land, and was seised *in dominico suo sicut de fædo suo*; that is, had the inheritance and enjoyment thereof to him and his heirs; the heir might demand the seisin of his ancestor by the following writ: *Rex vicecomiti salutem. Si G. filius T. fecerit te securum de clamore suo prosequendo, tunc sum-mone per bonos summonitores duodecim liberos et legales homines de vicineto de villâ, &c. quòd sint coram me vel justitiis meis die, &c. parati sacramento recognoscere, si*

(a) Glanv. lib. 13. c. 1.

(b) Ibid. c. 2.

T. pater prædicti G. fuit seisitus in dominico suo sicut de fædo suo, de unâ virgatâ terræ in villâ, &c. die quâ obiit; si obiit post primam coronationem meam, et si ille G. propinquior hæres ejus est. Et interim terram illam videant, et nomina eorum imbrevari facias. Et summane per bonos summonitores R. qui terram illam tenet, quidd tunc sit ibi auditurus illam recognitionem. Et habeas ibi summonitores, &c. This writ was varied in some parts of it, according to the circumstances under which the person died seised; as, whether he was seised the day he undertook a peregrination to Jerusalem, or St. Jago, in which journey he died; or the day he took upon him the habit of religion, the latter being a civil death, which intitled the heir to succeed immediately (a). If the heir was within age, the clause "*si G. filius T. fecerit te securum de clamore suo prosequendo*" was left out, the infant not being able, by law, to bind himself in any security; as was also the clause, *si T. pater prædicti G. obiit post primam coronationem meam* (b).

When the sheriff had received this writ, and the demandant had given security in the county-court for prosecuting his claim (c), they proceeded to make an assise in this way: Twelve free and lawful men of the vicinage were chosen, according to the direction of the writ. This was in the presence, perhaps, of the parties; though it might be in the absence of the tenant, provided he had been properly summoned to attend: for he should always be once summoned, to hear who were chosen to make the recognition; and, if he pleased, he might except to some, upon any reasonable cause. If he did not come at the first summons, they did not wait for him; but the twelve jurors were elected in his absence, and sent by the sheriff to view the land or tenement whose seisin was in dispute: and Glanville says, that the tenant was to have one summons more. The sheriff caused the names of the twelve

(a) Glanv lib. 13. c. 2, 3, 4, 6.

(b) Ibid. c. 5.

(c) *De clamore suo prosequendo.*

to be inserted in a writ (*a*); then summoned the tenant to be present at the day appointed by the writ, before the king or his justices, to hear the recognition. The tenant might essoin himself at the first and second day (provided the demandant was not an infant), but there was no essoin allowed him at the third day; for then the recognition was taken, whether he came or not; it being a rule, that no more than two essoins should be allowed in any recognition upon a seisin only; and in a recognition upon a novel disseisin, there was no essoin at all. At the third day, then, the assise was taken, whether the tenant came or not. If the jurors declared for the demandant, the seisin was adjudged to him, and a writ of the following kind went to the sheriff to give execution thereof: *Scias quòd N. dirationavit in curiâ meâ seisinam tantæ terræ in villâ, &c. per recognitionem de morte antecessoris sui versus R. et ideo tibi præcipio quòd SEISINAM illam ei sine dilatione HABERE FACIAS, &c.* (*b*)

By force of this writ he recovered not only seisin of the land, but seisin of all the chattels and every thing else which was found upon the fee, at the time of seisin being made by the sheriff. When the seisin was in this manner recovered, the person who lost might afterwards, notwithstanding, contest the right, in a writ of right; but Glanville doubted, how long after the seisin so delivered, he might pursue his remedy for the right (*c*). If the oath of the jurors was in favour of the tenant, and he was absent, the seisin remained to him, without the adverse party having any power to recover it: though this did not take away his cause of action for the right, as in the former case; nor, on the other hand, did a suit depending upon the right to a tenement, extinguish a recognition upon the seisin of one's ancestor, unless the duel was waged upon the right; though the pursuing such a recognition was a sort of contempt of court; the punishment, however, of which Glanville seems to think was not ascertained (*d*).

(*a*) *Imbreviari.* (*b*) *Glanv. lib. 13. c. 7, 8.* (*c*) *Ibid. c. 9.* (*d*) *Ibid. c. 7.*

When both parties appeared in court, it used ^{Exceptions} to be asked of the tenant, if he could say any ^{to the assise.} thing why the assise should *remanere*, as they called it; that is, should be barred, or not proceed. Many good causes might be shewn why the assise should *remain*. If the tenant confessed in court, that his ancestor, whose seisin was in question, was seised in his demesne as of fee, the day he died, with all the circumstances expressed in the writ, there was no need to proceed in the assise; but if he confessed the seisin only, and denied all, or some circumstances, the assise proceeded upon those circumstances which were not admitted.

There were many other causes upon which the assise *mortis antecessoris* used to remain. The tenant might admit, that the demandant was seised after the death of his father, or some other ancestor (whether such ancestor was seised the day of his death or not); and that being in such seisin, he did such or such an act which deprived him of the benefit of the assise; as for instance, that he sold the land to him, or made a gift of it, or quit-claimed it, or made some other lawful alienation thereof: and upon these points, says Glanville, they might go to the trial by duel, or any other kind of proof which was usually allowed by the court in questions of right. In like manner, the tenant might say, that the demandant had heretofore commenced a suit against him concerning the same land, and that there was then a fine made between them in the king's court; or that the land fell to him upon a final decision by duel, whether the duel was in the king's court or any other; or that it was his by the judgment of some court, or by quit-claim solemnly made. Villenage might be objected against the demandant; and, if proved, it took away the assise; as did also the exception of bastardy, and the king's charter confirming to the tenant the land in question; the conjunction of more heirs than one, as of women in a military fee, and of men and women together in free soc-

cage. Again, if it were admitted, that the ancestor whose seisin was in question had a seisin of some sort or other, namely, that he had it from the tenant or his ancestor, either in pledge, or *ex commodato*, or by any similar means; in these cases the assise was to remain, and the plea to proceed in some other way. Consanguinity was an exception which took away the assise.

Where it happened, as we before mentioned in speaking of frank-marriage, that the eldest brother gave part of his land to his younger brother, who died without heirs of his body; in such case, the assise would remain, on account of the rule before stated, that *nemo potest hæres simul esse ejusdem tenementi et dominus*. In like manner, if the demandant either confessed, or was proved to have been in arms against the king, any assise which he might bring against another would, *ipso facto*, remain. We are told also by Glanville, that by force of a particular law (*a*), burgage-tenure was a good exception to cause the assise to remain. When none of these, nor any other cause was stated why the assise should remain, the recognition proceeded in form; and both parties being there present, the seisin was tried by the oaths of the twelve jurors, and, according to their verdict, was adjudged to one party or the other (*b*).

When the demandant in this assise was an infant, and the tenant was of full age, the tenant was not allowed an essoin, and the recognition proceeded the first day, whether the tenant appeared or not. It was so ordered for this never-failing reason, that wheresoever the tenant, if present in court, could say nothing why the assise should remain, the recognition ought, by law, to proceed, without waiting for the appearance of the adverse party. Now, in this case, if the tenant was present, the allegation of the

(*a*) This is another law alluded to by Glanville, of which we find no other mention.

(*b*) Glanv, lib. 13. c. 11.

demandant's infancy would be no cause for the assise to remain, and therefore the recognition was to proceed of course; but if restitution was made to the infant by the recognition, the minor's coming of age was to be expected, before he could be made to answer upon the question of right, should any be moved against him. The course was the same where both parties were minors (a).

But where the demandant was of full age, and the tenant a minor, it was different; for there the minor might essoin himself in the usual way: and when he appeared, he might pray that the recognition might not be taken till he was of full age; and thus the recognition *de morte antecessoris* often remained, on account of the age of one of the parties. To procure, however, this delay, the minor must say, that he was in seisin of the tenement in question; and also, that his father or some other ancestor died seised: for neither a recognition, nor a suit upon the right, would remain as against a minor, if he himself had acquired seisin of the tenement, and he held it by no other right than what he had so made to himself. But should it be replied to what the minor had said, that true it was his ancestor died seised of the tenement in question, yet it was not *ut de fædo*, but only *ut de wardâ*; then, though the principal recognition would remain on account of the age of the minor, yet a recognition would proceed on that point, and a writ of summons would accordingly issue for twelve jurors to the following effect: *Rex vicecomiti, &c. Summone per bonos summonitores duodecim liberos et legales homines de vicineto de villâ, &c. quòd sint coram me vel justitiis meis ad terminum, &c. parati sacramento recognoscere si R. pater N. qui infra ætatem est, seisitus fuit in dominico suo de unâ carucatâ terræ in villâ, &c. unde M. filius et hæres T. petit recognitionem de morte ipsius T. patris sui versus ipsum N. ut de fædo suo die quâ obiit, vel ut de wardâ. Et interim terram illam videant, et nomina eorum*

(a) Glanv. lib. 13. c. 12.

imbreviari facias. Et summane per bonos summonitores prædictum N. qui terram illam tenet, quòd sit ibi auditurus illam recognitionem, &c. (a)

In this case, the proceeding somewhat differed from other instances of recognitions; for if a day had been given to both parties, there was then no summons to the tenant to hear the recognition; but it proceeded without delay, and according to the verdict of those twelve jurors, delivered upon their oaths, it was declared what sort of seisin the ancestor had; and if it was only *ut de wardd*, the demandant recovered against the minor. But Glanville doubts, whether this was enough to entitle the demandant to recover; for as yet, it did not appear that his ancestor died seised in his demesne as of fee, nor that he was the next heir; and he puts it as a question, whether recourse was to be had to the principal recognition upon that point. However that might be, yet in case it had been proved by the oaths of the twelve jurors, that the ancestor of the minor died seised as of fee, then the seisin was to remain to the minor till he attained his full age; but after he was come of age, the other party might bring in question *the right* either against him or his heirs. It should be remembered, that it was only in the above case that a recognition was allowed to proceed against a minor; for it was a general rule, that a minor was not bound to answer in any suit by which he might be disinherited, or lose his life or member: except, that he was obliged to answer to suits for his debts, and also for a novel disseisin. If, in the above case, the seisin had been adjudged to the demandant, restitution was to be made in the form before mentioned; and he, in like manner, could not be compelled to answer the minor upon *the right* till he was of full age. Such mutual permission to stir questions, after a determination, was grounded upon this prevailing reason, that whatever was

(a) Glanv. lib. 13. c. 13, 14.

transacted with persons under age, in pleas of this sort, ought not to remain fixed and unalterable (a).

If a person claimed the privilege of a minor, and it was objected to him that he was of full age, this was to be decided by the oaths, not of twelve, but of eight free and lawful men, who were summoned by a similar writ with those we have so often mentioned for summoning jurors: *octo liberos et legales homines de vicineto de villâ, &c. &c. recognoscere, utrùm N. qui clamat unam hidam, &c. sit talis ætatis, quòd inde placitare possit et debeat. Et interim terram illam videant, et nomina eorum, &c. &c. (b)*

If he was proved by this recognition to be of full age, they proceeded to the principal recognition, as in other cases. Here Glanville makes a question, whether he was thenceforward to be esteemed of full age, so as to lose his privilege of age as against all other persons: and again, suppose he had been found a minor, whether that was sufficient, without more, to entitle him to the privilege in all other suits (c).

The next recognition is that *de ultimâ præ-* Assisa ultimæ presentationis. *sentatione.* When a church was void, and a dispute arose about the presentation, the controversy might be determined by this recognition, at the prayer of either party. The writ, in such case, was of the following kind: *Summone, &c. duodecim liberos et legales homines de vicineto, &c. &c. parati sacramento recognoscere, quis advocatus præsentavit ultimam personam, quæ obiit ad ecclesiam de villâ, &c. quæ vacans est, ut dicitur, et unde N. clamat advocationem. Et nomina eorum imbrevari faciās. Et summone per bonos summonitores R. qui præsentationem ipsam deforceat, quòd tunc sit ibi auditurus illam recognitionem, &c. (d)* What the essoins were in this recognition, may be collected from what has gone before. The person to whom or to whose ancestors the last presentation

(a) Glanv. lib. 13. e. 15.

(b) Ibid. c. 15, 16.

(c) Ibid. c. 17.

(d) Ibid. c. 18, 19.

was adjudged by the recognition, was considered as having thereby obtained seisin of the advowson; so that he was to present to the first vacancy, and his parson was to hold the presentation during his life, whatever was the fact about *the right* of advowson; for the person who lost the last presentation by a recognition, might yet move a question upon the right of advowson(a).

The tenant might, in this as well as the foregoing writ, state some reason why the assise should not proceed. He might say, that he admitted the ancestor of the demandant made the last presentation, as the real lord and heir; but that afterwards he transferred the fee, to which the advowson was appendant, to the tenant or his ancestors, by a good and lawful title: upon which allegation the assise would remain, and either party might pray a recognition upon the truth of this exception. Again, either party might admit that he or his ancestors made the last presentation, but that it was *ut de wardā*, not *ut de fædo*; upon which a recognition might be prayed, which would be summoned by a writ similar to the many we have mentioned: *duodecim liberos, &c. recognoscere, si R. qui præsentavit, &c. fecerit illam præsentationem ut de fædo, vel ut de wardā, &c.* And if the recognition declared the last presentation was made *ut de wardā*, the advowson of the presentation was at an end, and thenceforth belonged to the other party; if *ut de fædo*, the presentation remained to him(b).

We come now to the recognition concerning a tenement, *utrū sit laicum vel ecclesiasticum*, which might be had upon the prayer of either party. For summoning such a recognition, there issued a writ like the former: *recognoscere, utrū una hida terræ, quam N. persona ecclesiæ de villā, &c. clamat ad liberam eleemosinam ipsius ecclesiæ suæ versus R. in villā, &c. sit laicum fædum ipsius R. an fæ-*

(a) Glanv. lib. 13. c. 20.

(b) Ibid. c. 20, 21, 22.

dum ecclesiasticum. Et interim terram videant, &c. (a) It was a rule in this, and indeed in all others, except the great assise, that no more than two essoins should be had; for the third was never admitted, but where the court could be certified of the party's illness, whether he was *languidus* or not; and as this, says Glanville, was not usually done in recognitions, they always were without a third essoin. This recognition proceeded in the same way as the former; and if it was proved by the recognition that the tenement was ecclesiastical, it could not afterwards be considered as a lay fee, though it might be claimed as holden by the church for a certain service (b).

The next was the recognition, whether a person died seised *ut de fædo, vel ut de vadio*. If a person claimed a tenement as having been pledged by him or his ancestors, and the other party claimed it not as a pledge, but in fee, then a recognition was resorted to, and was summoned as in other cases: *recognoscere, utrùm N. teneat unam carucatam, &c. in fædo, an in vadio, &c.* or it might be, *utrùm illa carucata, &c. sit fædum vel hæreditas ipsius N. an invadiata ei ab ipso R. vel ab ipso H. antecessore ejus. Et interim terram videant, &c.* (c) Sometimes, when a person died seised *ut de vadio*, the heir, upon such seisin, would bring a writ *de morte antecessoris* against the true heir, who had by some means got seisin of the land; and then, if the tenant admitted the seisin of the demandant's ancestor, but said it was *ut de vadio*, and not *ut de fædo*; a recognition was summoned in the following form: *recognoscere, utrùm N. pater R. fuerit seisitus in dominico suo ut de fædo, an ut de vadio, de unâ carucatâ, &c. die quâ obiit, &c.* (d)

If it was proved by the recognition to be a pledge only, and not an inheritance, then the tenant who claimed it as his inheritance lost the tenement; so that he could not even

(a) Glanv. lib. 13. c. 23, 24.
26, 27.

(d) Ibid. c. 28, 29.

(b) Ibid. c. 25.

(c) Ibid. c.

make use of it, in the manner we mentioned concerning actions of debt, for the recovery of the debt for which it was a pledge. If, on the other hand, it was recognized to be an inheritance in the tenant, the demandant could recover it no other way (if at all) than by a writ of right. Glanville makes a question, whether in this, or any other recognition, the warrantor was to be waited for, particularly if he was vouched after two essoins had been had (a).

The nature of the recognitions which remain to be mentioned, may partly be collected from those of which we have already treated, and partly from the terms of the award made in court for their being taken, and the allegations of both parties, which were to be tried. Indeed, some of them have been already noticed; as that for trying whether a person was of age (b); that for trying whether a person died seised *ut de fædo*, or *ut de wardâ* (c); that for trying whether a presentation was made in right of the inheritance, or only in right of a wardship (d): all these recognitions were conducted as the others, in respect of essoins, and they proceeded or remained for the same reasons as prevailed in the rest (e).

It must be observed of these *assises* (for so they are sometimes called by Glanville, but more commonly *recognitions*), that they are not all of the same kind; that *de morte antecessoris* being evidently an original proceeding, independent of any other; the rest (not excepting that *de ultimâ præsentatione* (f)), and that *utrùm laicum fædum vel ecclesiasticum*) being merely for the decision of facts which arose in some original action or proceeding. Thus, the writs for summoning recognitions of the latter kind were simple writs of summons: they mentioned that a plea was

(a) Glanv. lib. 13. c. 30. (b) Ibid. c. 15, 16, 17. (c) Ibid. c. 13, 14, 15. (d) Ibid. c. 20, 21, 22. (e) Ibid. c. 31.

(f) That the assise *de ultimâ præsentatione* was such, see what we have before said, p. 110, in the plea upon a right of advowson, where this writ is awarded to try a collateral matter, arising in a writ of right of advowson.

depending in court by the king's writ; and they were granted at the prayer of either party; so that they seemed to be resorted to, by the assent of parties, for settling an incidental question, on which they put the dispute between them. On the other hand, the writ *de morte antecessoris* has all the appearance of an original commencement of a suit. It issued only upon condition the demandant gave security to prosecute it,--*si G. filius T. fecerit te securum de clamore suo prosequendo, Tunc summone*,--and made no mention of a plea depending. Of the same kind was the writ *de novâ disseisinâ*, which will be mentioned presently. Thus, then, of all the assises in use in Glanville's time, it was only that *de morte antecessoris*, and that *de novâ disseisinâ*, that were original writs. Whether there were any recognitions for trying collateral facts, besides those mentioned in Glanville, it is difficult to determine; this being one of the many circumstances of which we must remain ignorant, for want of knowing the terms of the famous law made by Henry II. about assises.

We shall, lastly, speak of that which was called *Assisa de novâ disseisinâ*. When any one disseised another of his freehold unjustly, and without any judgment of law to authorise him, and the fact was within the king's assise; that is, if it was since the last voyage of the king to Normandy (a), which was, it seems, the time limited for this purpose in the famous law so often alluded to; he might then avail himself of the benefit of that law, and have the following writ to the sheriff: *QUESTUS EST mihi N. quòd R. injustè et sine judicio disseisivit eum de libero tenemento suo in villâ, &c. post ultimam transfre-*

(a) This was A. D. 1184, in the 30th year of Henry II.; so that the time of limitation, during that reign, was never more than about four years.

In the printed text of Glanville, there are these words between brackets: *Quod quandoque majus quandoque minus censetur*; which passage has been thought to import, that the time of limitation was often varied in this king's reign. Another meaning of this passage may be, that the period (the *terminus à quo*) being fixed, it must necessarily, by the lapse of time, be lengthening every day. After all, the passage lies under some suspicion of interpolation, and was, perhaps, for that reason put between brackets by the editor. This voyage into Normandy is referred to by later writers, as the limitation before the statute of Merton altered it.

tationem meam in Normanniam: et ideo tibi præcipio, quòd si PRÆFATUS N. FECERIT TE SECURUM DE CLAMORE SUO PROSEQUENDO, tunc facias tenementum illud reseisiri de catallis quæ in eo capta fuerunt, et ipsum cum catallis esse facias in pace usque ad clausum Paschæ. Et interim facias duodecim liberos et legales homines de vicineto videre terram illam; et nomina eorum imbrevari facias. Et summane illos per bonos summonitores, quòd tunc sint coram me vel justitiis meis, parati inde facere recognitionem. ET PONE PER VADIUM ET SALVOS PLEGIOS PRÆDICTUM R. VEL BALLIVUM SUUM, SI IPSE NON FUERIT INVENTUS, quòd tunc sit ibi auditurus illam recognitionem, &c. (a)

These writs of novel disseisin were of different forms, according to the nature of the freehold in whose prejudice the disseisin was made. There is one in Glanville for razing or prostrating a dyke *ad nocumentum liberi tenementi*; another for razing a mill-pool *ad nocumentum liberi tenementi*; another for a common of pasture appertaining *ad liberum tenementum* (b). These are all the writs of novel disseisin mentioned in Glanville.

In this recognition no essoin was allowed, but the recognition proceeded at the first day, whether the disseisor appeared or not; for here no delay was suffered either on account of minority, or a vouching to warranty; unless a person would in court first acknowledge the disseisin, and then he might vouch a warrantor, and the recognition would remain; the disseisor would be in the king's mercy; the warrantor was summoned; and the proceeding went on between him and the disseisor, who vouched him. It must be observed, that in this recognition, whoever lost his suit, whether the demandant or tenant, or, as Glanville terms them (with a view perhaps to there being a sort of criminality (c) in a disseisin), the appellor and the appealed,

(a) Glanv. lib. 13. c. 32, 33.

(b) Ibid. c. 34, 35, 36, 37.

(c) In the canon law, a forcible intrusion into an ecclesiastical benefice is construed *rapina*. Corv. Jus Can. lib. 4. tit. 24.

he was in the king's mercy. If the appellor did not prosecute, by keeping the day appointed, his pledges also were in the king's mercy; and the like happened to the other party, if he made default. The penalty ordained by the constitution which established this proceeding was only the *misericordia regis*, so often mentioned. It often happened in this recognition, that the demandant, after he had proved the disseisin, wanted a writ to the sheriff to be put in possession of the produce and chattels upon the land, the form of which writ we have before shewn (*a*). It should be remarked, that this writ to recover the chattels pursued the original writ of novel disseisin, which directed the party to be resealed of the chattels: in no other recognition was there any mention in the judgment *de fructibus et catallis* (*b*).

Having taken this view of the divers Of terms and
vacations. manners in which justice was obtained, it seems to follow, that something should be said of the times which were allotted, at this early period, for the regular administration of it. The division of the year into term and vacation has been the joint work of the church and necessity. The cultivation of the earth, and the collection of its fruits, necessarily required a time of leisure from all attendance on civil affairs; and the laws of the church had, at various times, assigned certain seasons of the year to an observance of religious peace, during which all legal strife was strictly interdicted. What remained of the year not disposed of in this manner, was allowed for the administration of justice. The Anglo-Saxons had been governed by these two reasons, in distinguishing the periods of vacation and term; the latter they called *dies pacis regis*; the former, *dies pacis Dei et sanctæ ecclesiæ* (*c*). The particular portions of time which the Saxons had allowed to these two seasons were adhered to by the Normans, together with other Saxon usages; and their term and vacation were as follow.

(*a*) Glanv. lib. 13, c. 38, 39. (*b*) Ibid. c. 38. (*c*) Leg. Confes. c. 9.

It seems that *Hilary* term began *Octabis Epiphaniæ*; that is, the 13th of January, and ended on Saturday next before Septuagesima; which being moveable, made this term longer in some years than others. *Easter* term began *Octabis Paschæ* (nine days sooner than it now does), and ended before the vigil of Ascension (that is, six days sooner than it now does). *Trinity* term began *Octabis Pentecostes*; to which there does not seem to have been any precise conclusion fixed by the canon which governed all the rest; it was therefore called *terminus sine termino*: it seems to have been determined by nothing but the pressing calls of hay-time and harvest, and the declension of business very natural at that season. But the conclusion of it was fixed afterwards by parliament: by stat. 51 Hen. III. it was to end within two or three days after *quindena sancti Johannis*; that is, about the 12th of July. In latter times, by stat. 32 Hen. VIII. Trinity-term was to begin *Crastino sanctæ Trinitatis*. *Michaelmas* term began on Tuesday next after St. Michael, and was closed by Advent; but as Advent-Sunday is moveable, and may fall upon any day between the 26th of November and 4th of December; therefore the 28th of November, as a middle period, by reason of the feast and eve of St. Andrew, was appointed for it. Thus were the terms in the latter part of the Saxon times, and during this period, almost in the same state we have them now; and by them the return of writs and appearances were governed (a).

The criminal law. Having gone through the law of private rights, and the several remedies furnished for the recovery and protection of property; it remains to say something of the criminal law, as it stood at the latter end of the reign of Henry II. But, previous to this, it may be proper to take a view of some few regulations that had been made on the subject of crimes and punishments antecedent to the time of which we are now writing. We have seen that a law

(a) Spelman Orig. of Terms.

was made by William the Conqueror, which took away all capital punishments, and, instead thereof, directed various kinds of mutilation. This law was repealed in one instance, A. D. 1108, in the 9th year of Henry I. when it was enacted, that any one taken *in furto vel latrocinio* should be hanged, without allowing any pecuniary *were* to be paid, as a redemption (a). The law of William, however, still operated in other cases: the punishment of crimes consisted in mutilations of various kinds; and it will presently be seen that this law of Henry I. was dispensed with, or repealed.

Some provisions respecting the administration of criminal justice had been made by the statutes of Clarendon, that were republished at Northampton. It was thereby directed, that any one charged before the king's justices with the crime of murder, theft, robbery, or receipt of such offenders, of forgery, or of malicious burning, by the oaths of twelve knights of the hundred; if there were no knights, by the oaths of twelve free and lawful men, and by the oaths of four out of every vill in the hundred; that any one so charged, should submit to the water ordeal; and if he failed in the experiment, he should lose one foot: and afterwards at Northampton it was added, in order to make the punishment more severe, that he should lose his right hand, as well as one of his feet; and also that he should abjure the realm, and leave it within forty ^{Of abjuration,} days; and even if he was acquitted by the water ordeal, that he should find pledges to answer for him; and then he might remain in the realm, unless he was charged with a murder, or some other heinous felony, by the commonalty, and lawful knights of the country. If he was charged with any of those crimes, notwithstanding his acquittal by the ordeal, he was to leave the kingdom within forty days, and carry all his goods with him (with a saving of all claims his lord might have on them), and so abjure the realm, and be at the king's mercy, as to any

(a) Wilk. Leg. Ang. Sax. p. 304.

permission to return. This regulation was to be in force *so long as the king pleased*, in all cases of murder, treason, and malicious burning; and in all the before-mentioned crimes, except in *small* thefts and robberies committed during the war (which was just concluded), in taking horses, oxen, and the like.

Thus an offender was subjected to a trial, by which, if convicted, he was to lose a limb, and be banished; if acquitted, he was likewise to be banished. Such a method of proceeding can be imputed to nothing but some doubt entertained of the justness of this trial by ordeal. It is related, that, before this, William Rufus having caused fifty Englishmen of good quality and fortune to be tried by the hot iron, they escaped unhurt, and were of course acquitted; upon which that monarch declared he would try them again by the judgment of his court, and would not abide by this pretended judgment of God, *which was made favourable or unfavourable at any man's pleasure*. The king looked upon this trial to be fraudulently managed, as no doubt it was; and Henry II. convinced of the fraud, would not allow such an acquittal to have its full effect (a); though it is a strong mark of the barbarism and prejudices of these times, that a practice liable to such suspicion was still suffered to continue as a judicial proceeding; and that they would rather punish those who were lawfully acquitted by it, than altogether abandon such an abominable proceeding.

Another provision made by the statute of Northampton, related to the old law concerning decennaries. It declared that no one, in a borough or vill, should entertain any strange guest in his house more than one night, unless he would engage to answer for his appearance; or such guest had some reasonable excuse for staying, which his host was to make known to the vicinage; and when he went away, it was to be by day, and in the presence of the vicinage. Another ordinance was, to secure the punishment

(a) Litt. Hen. II. vol. 4. 279.

of criminals who had been prosecuted, and appealed before the inferior magistrates, in order to a final trial before the king's justices: it declares, that any one taken for murder, theft, robbery, or forgery, and confessing himself guilty before the chief officer of the hundred or borough, or before certain lawful men, should not be permitted to deny the fact, when brought before the justices (a).

Such is the substance of certain statutes made for the improvement of criminal proceedings, in this and the preceding reigns. We shall now speak of the penal law in general, and the way of prosecuting offenders, as practised towards the end of the reign of Henry II. But in this, we shall confine our enquiries to such objects as relate to the *curia regis* only; contenting ourselves with subjoining a short account of the proceedings before justices itinerant.

When a person was *infamatus*, as Glanville terms it, or accused of the death of a man, or of any sedition moved in the realm or army, it was either upon the charge of a certain accuser, or not. If no certain accuser appeared, but he was accused only by the voice of public fame, or, as Glanville says, *fama tantummodo publica accusat* (which signified probably nothing more than what the statute of Northampton calls *per sacramentum legalium hominum*); he was immediately to be safely attached, either by proper pledges, or by a much safer security, that is, *per carceris inclusionem*. Then the truth of the matter was inquired before the justices, by many and various inquisitions and interrogations; every probability was to be weighed, and every conjecture to be attempted, from facts and circumstances, which could be thought to make either on one side or the other. In conclusion, the criminal was either to be intirely acquitted, upon such inquiry, or was to be put to purge himself *per legem apparentem*; that is, by a number of compurgators.

(a) Wilk. Leg. Ang. Sax. p. 330.

If upon this trial *per legem* he was convicted, his life and members depended upon the judgment of the court, and the grace of the king, as in other cases of *felony*; for so Glanville calls this offence of *sedition regni vel exercitus* (a).

If a certain accuser, or, as he is sometimes called by Glanville, and was afterwards more commonly called, an *appellor*, appeared at first, he was to be attached by pledges, if he could find any, for prosecuting the suit; if he could not find pledges, he was trusted upon his solemn promise and engagement to prosecute: and this was the more common security for prosecuting felonies; lest binding by too severe an obligation, might deter persons from assisting in bringing offenders to justice.

When the accuser had given security for prosecuting, then the person accused, as in the former case, used to be attached by safe pledges; and if he had none, was committed to prison: and it was a rule, that in all pleas of felony, except homicide, the accused person was to be discharged upon giving pledges.

Then a day was appointed, upon which the parties might have their lawful essoins. At length the accuser would propose what charge he had to make. He might perhaps say, that he saw, or would by some other means prove, the accused to have attempted or done something against the king's life, or towards moving sedition in the realm or army; or to have consented, or given aid, or counsel, or lent his authority towards such an attempt; and add that he was ready *dirationare*, to deraign or prove it, as the court should award: and if to this the person accused opposed a flat denial, then the whole was decided by the duel. When the duel was once waged in suits of this sort, neither party could decline or go back, under pain of being esteemed *pro victo*, and suffering all the consequences attending such a defeat; nor could they be reconciled, or

(a) Glanv. lib. 14. c. 1. (a)

the question between them be compromised, any otherwise than by the licence of the king or his justices.

If the parties, at length, engaged in the duel, and the appellor was vanquished, he was to be *in misericordiâ regis*; in addition to which he incurred perpetual infamy, and certain disabilities which always attended the being vanquished in a judicial duel. If the party accused was vanquished, he suffered the judgment of life and limb above-mentioned; and besides that, all his property and chattels were confiscated, and his heirs were disinherited for ever. A remarkable difference is here to be observed between a conviction *per legem apparentem*, and by duel: on the former, which was a remnant of the old Saxon jurisprudence, a felon suffered only the pains of death; but if convicted on the latter, which was a mode of trial introduced by the Normans, he suffered the additional penalty of forfeiture.

Every freeman, being of full age, might be admitted to this sort of accusation, or appeal; yet should a person within age appeal any one, he was nevertheless to be attached in the manner just mentioned. A rustic (by which it may be supposed that Glanville means a person not free) might bring such an appeal; but a woman was not admitted to prosecute an appeal of felony, except in some particular cases, which will be hereafter mentioned. The party accused might decline the duel, in suits of this sort, on account of his age, or some mayhem received; that is, if he was sixty years of age; or if he had broke a bone, or had suffered in his head, either *per incisionem*, or *per abrasionem*; for such only were considered as mayhems. And in these cases, the party accused was to purge himself *per Dei judicium*; that is, by the hot iron, or by water, according to his condition: if he was *homo liber*, a free man, by the former; if a rustic, or not free, by the latter (a).

(a) Glanv. lib. 14, c. 1.

A suit for the fraudulent concealment of treasure-trove was carried on as above stated, where there appeared a certain accuser. But, upon a charge of this crime, like that above called *publica fama*, the law did not permit that any one should be put to purge himself *per legem apparentem*, unless he had been before convicted, or had confessed in court, that he had found and taken some sort of metal in the place in question; and if he had been convicted thereof, the presumption then was so much against him, that he was obliged to purge himself *per legem apparentem*, and shew that he had not found or taken any more. It should seem, from Glanville, that a particular law had been made to authorize the court to compel such a purgation, even where there was not the presumption before mentioned (a).

When any one was accused of homicide, it might be in the two ways stated, and the proceeding in either was as has been just seen. Only it should be observed, that the accused was never discharged upon giving pledges, unless, says Glanville, by the interposition of the king's particular prerogative and pleasure; by which it has been generally thought (b), that Glanville alludes to the writ *de odio et atia*; of which writ, however, we forbear to speak particularly, till we arrive at a period when we are certain that it was in use.

Homicide. There were two kinds of homicide: one that was called *murdrum*; which, in the words of Glanville, was *quod nullo vidente, nullo sciente, clam perpetratur, præter solum interfectorem, et ejus complices; ita quòd mox non assequatur clamor popularis, juxta assisam super hoc proditam*; such a secret killing, without the knowledge of any but the offenders, as prevented a hue and cry, ordained by statute to be made after malefactors. In an accusation or appeal for this crime of murder, none

(a) Glanv. lib. 14. c. 2.

(b) 2 Inst. 42.

was admitted to prosecute, except one who was of the blood of the deceased; and a nearer relation might exclude a remoter from deraigning the appeal. The other kind was that which was called *simple homicide*. In this crime also no one was admitted to become appellor, and make proof, unless he was allied to the deceased by blood, or by homage, or by dominion, and could speak of the death upon the testimony of his own eyes. Thus we see the qualification of the person to become appellor in simple homicide, extended further than in cases of murder; though it was required of him in this case, that he should have been an eye-witness, which could not be in the former from the very description of the crime, *nullo vidente*; and therefore the zeal and piety of the relation who charged a man with the crime, seems to have been taken instead of proof. Again, in this suit a woman might be heard as accuser, if it was for the death of her husband, and she could speak of what she herself saw. It will be shewn presently, that a woman might bring an appeal of an injury done to her own person, and, according to Glanville, it was only upon the consideration of man and wife being *one flesh*, that she was allowed this appeal of the death of her husband. In these cases, the person accused might chuse, either to let it rest upon the proof made by the woman, or purge himself from the imputed crime *per Dei judicium*. Sometimes a person charged (a) with simple homicide, if he had been taken in flight, with a crowd pursuing him, and this was legally proved in court by a jury of the country, was obliged to undergo the legal purgation, without any other evidence being brought against him (b).

The *crimen incendii*, or burning, was prosecuted and tried in the same way; as was also the *crimen roberiae*, or robbery (c).

(a) The expression in Glanville which is here construed *charged* is *reatatus*.

(b) Glanv. lib. 14. c. 3.

(c) Ibid. c. 4, 3.

The *crimen raptus*, says Glanville, was, ^{Rape.} when a woman declared herself to have suffered violence from a man in the king's peace; by which latter circumstance nothing more was meant, than that the offence was such as was cognisable in the king's court only. The law directed, that when a woman had sustained an injury of this kind, she should go, while the fact was recent, to the next village, and there *injuriam sibi illatam probis hominibus ostendere, et sanguinem, si quis fuerit effusus, et vestium scissiones*; she was to do the same to the chief officer of the hundred; and, lastly, was to make a public declaration of it in the first county court; after which she was to institute her plaint, which was proceeded in as in other cases; a woman being suffered to prosecute her appeal in this, as in all other instances of an injury done to her person. It should be remembered, as we before said, that it was in the election of the person accused, either to submit to the burthen of making purgation, or leave it upon the evidence of the woman herself. The judgment, in this crime, was the same as in those before mentioned. It was not enough for the offender, after judgment passed, to offer marriage; for in that manner, says Glanville, men of a servile or inferior condition would be enabled to bring disgrace upon women of rank, not for once, but for ever; and, on the other hand, men of rank might bring scandal on their parents and relations by unworthy marriages. We are informed, however, by the same authority, that it was customary, before judgment passed, for the woman and the man to compromise the appeal, and marry, provided they had the countenance of the king's licence, or that of his justices, and the assent of parents (a).

The *crimen falsi*, in a general and large sense, contained in it many species of that crime; the making of false charters, false measures, false money, and other falsifications; the manner of prosecuting which appeals was the

(a) Glanv. lib. 14. c. 6.

same as those we have just mentioned. A distinction, however, was observed between forging royal and private charters: if the former, the party was sentenced as in case of lèse majesty: if the latter, the offender was dealt more tenderly with, as in other cases of smaller forgeries; which were punished only by the loss of limbs (a).

Of the *crimen furti*, or theft, and other pleas which belonged to the sheriff's jurisdiction, Glanville gives no account, as they did not come within the design of his work, which was confined to the *curia regis*. The prosecution of them was ordered differently, according to the usage and practice of different counties (b).

Thus stood the law of crimes, and the method of proceeding, as far as related to the superior court. What was the office of the justices itinerant in the reign of Henry II. we have before stated from the statute of Northampton, when this establishment was revived. The jurisdiction of these justices was considerably increased soon after; as may be collected from certain *capitula*, or articles of enquiry, which were delivered to the justices itinerant in the year 1194, which was the fifth year of Richard I. According to those directions, they were to begin by causing four knights to be chosen out of the whole county, who, upon their oaths, were to elect two lawful knights of every hundred or wapentake; and those two were to chuse, upon their oaths, ten knights in every hundred or wapentake, and if there were not knights enough, then free and lawful men. These twelve together were to answer to all the *capitula* which concerned that hundred or wapentake.

When that was done, the justices were to enquire of and determine both *new* and *old* pleas of the crown, and all such as were not determined before the king's justices; also all *recognitions*, and all pleas which were summoned before the justices by the king's writ, or that of his chief-justice,

(a) Glanv. lib. 14. c. 8.

(b) Ibid. c. 8.

or such as were sent to them from the king's chief court. They were to inquire of escheats, presentations to churches, wardships, and marriages, belonging to the king. They were to inquire of malefactors, and their receivers and encouragers; of forgers of charters and writings; of the goods of usurers; of great assises concerning land worth 100 shillings a-year, and under; and of defaults of appearance in court.

They were to chuse, or cause to be chosen, three knights and one clerk in every county, who were to be *custodes placitorum coronæ*; the same, probably, who were afterwards called *coronatores*, but they are not mentioned by that name in this reign. They were to see that all cities, boroughs, and the king's demesnes, were taxed. They were to enquire of certain rents in every manor of the king's demesnes, and the value of every thing on those manors, and how many carucates or ploughlands they contained. They were also to swear good and lawful men, who were to chuse others in different parts of the county, to be sworn to see the king's escheats and wardlands, as they fell in, well stocked with all necessaries. Besides these, there were several articles relating to the Jews, which were occasioned by the outrages that had lately been committed by the populace against that people; as also concerning the lands and goods of John earl of Morton, who had incurred great forfeitures to the king (a).

In the year 1198, being the 10th year of this king, the justices itinerant had certain *capitula* delivered in charge to them, somewhat different from the preceding. As a view of such articles is the only means of gaining a true idea of the commission and office of these justices, it will be proper just to mention its contents. They were directed to hear and determine all pleas of the crown, both new and old, which had not been determined before the king's justices; and all assises *de morte antecessoris*, *de novâ disseisinâ*, and *de magnis assisis* concerning lands of 10l. by

(a) Wilk. Leg. Ang. Sax. p. 46, & seq.

the year and under; and of advowsons of churches. They were to enquire of vacant churches, wards, escheats, and marriages, as in the former *capitula*; of usury; of those *in misericordia regis*; of purprestures; of treasure-trove; of malefactors and their receivers; of fugitives; of weights and measures, according to the late assise made thereon the preceding year; of customs received by officers of sea-ports; lastly, of those who ought to appear at the *iter*, but neglected their duty (a).

This same year, and before the *itinera* of the justices were over, the king appointed his justices of the forest to hold an *iter*, which was as solemn a proceeding as the other; but carried with it more terror, and a degree of oppression, on account of the grievous nature of the institution of forests in all its parts. These justices were commanded to summon, in every county through which they went, all archbishops, bishops, earls, barons, and all free tenants, with the chief officer and four men of every town, to appear before them *ad placita forestæ*, and hear the king's commands (b).

It does not come within the scope of this History to enter minutely into a detail of the constitution and political events in the government of this and the succeeding times. A history, however, of our jurisprudence would be imperfect without giving some small consideration to this subject, so far, at least, as it is connected with the formation and administration of our laws.

In the first ages of civil society, while laws are few, and the execution of them feeble, much must be left to the authority of the sovereign power. As the experience of later times points out the deficiencies of former laws,

(a) Wilk. Leg. Ang. Sax. p. 350.

(b) Ibid. For the assise of the forest, and the articles of enquiry before the justices, see Wilk. Leg. Ang. Sax. p. 351.

and particular remedies are applied, the exercise of this sovereign power seems so far to be abridged. The prerogative of the prince, and the dominion of the laws, in this manner occasionally take place of each other: upon the increase of the latter, the former gives way and retires, collecting all its powers for the sole purpose of aiding and enforcing a due observance of the established law.

The just and requisite prerogative of the crown was perhaps very extensive in the Saxon times; but after the Conquest there concurred a number of circumstances, all tending to increase the power of the sovereign beyond the mere exigencies of orderly government.

The revolution effected by William did, in its consequences, render that prince powerful beyond all the sovereigns of his time, and all that have reigned since in this kingdom; for it threw the greatest part of the nation into a state of dependence on him for their lives and estates. The novelty of his reign, and the peculiar situation in which the prince stood, drove him upon every exertion of which his authority was capable; and, notwithstanding he confirmed to the nation the enjoyment of all their customs and laws, he made those laws themselves occasionally submit to the controul of his power, whenever the necessities of his government demanded it. So much was the whole kingdom awed by his greatness, that no infringement of their laws was resented by the people during his reign.

What had been by force acquired to the Conqueror, continued in his successor through the same force, or the prevalence of an established government; and though some concessions were reluctantly made by subsequent monarchs, as will be seen hereafter, and the high claims of the crown were, in some degree, relaxed in favour of the people, they had no lasting effect: the exercise of an extensive prerogative continued in the crown through all these reigns,

and rendered the condition of the subject extremely precarious and miserable.

The crown was assisted in the exercise of this prerogative by the manner in which the Norman law was introduced. The English, who had seen the laws of their Anglo-Saxon ancestors confirmed, had the fullest confidence that they should be governed by them in all questions concerning their persons and property. In the mean time, the Normans, who had taken sole possession of the king's court, had the debate and determination of all questions there agitated; and, continually recurring to the notions and principles of law in which they had been bred, determined conformably with that law most points of doubt and difficulty. Thus the English, while they possessed the letter of their law inviolate, saw all their old customs explained away; or so cramped and modified, as to amount almost to an abrogation of them.

In this conflict between the Norman and English laws, the prerogative of the king must necessarily have found occasions of enlarging its pretensions. While the rules of property and methods of proceeding were yet fluctuating and unsettled, every chasm was supplied, and every impediment removed, by the great power of the crown; the only subsisting authority which could reconcile the two contending polities. While the rights of persons and of property were not precisely defined, and it was not unanimously agreed by what set of rules and principles they were to be judged, the crown took every advantage, and interfered and dictated absolutely in most judicial inquiries.

It was during this precarious state of our laws, that the people were constrained to purchase the favour of the crown, in order to obtain justice in the king's courts (a). Fines were paid for the express purpose of having justice and right. Presents of a considerable value were made by suitors to obtain the opinion of the king's justices in a

(a) Madox Excheq. 293.

cause depending; for writs, pleas, trials, judgments. Sometimes part of the debt in contest was proffered to the crown for a favourable decision. Thus was the common course of justice made liable to the interference and controul of royal authority.

This is only one instance, among many others, of the scope given to the exercise of supreme authority, while the state of our law was so unsettled, and its efforts so feeble. Besides the uncertain condition of our legal polity, other causes, rooted in the constitution of the government, contributed to arm the king with extraordinary powers. The strict feudal submission of a vassal to his liege lord encouraged the notion of an entire obedience in all things to the king, who being supreme over all the lords in his kingdom, was, of course, to surpass them in the petty prerogatives which they themselves claimed within their own demesnes. These various causes concurring with the immense authority possessed by the first Norman king, enabled this race of monarchs to assume prerogatives, and exercise acts of sovereignty, to the last degree oppressive and tyrannical.

Besides the exertions of prerogative, the law itself, which had been framed under so baneful an influence, was arbitrary and cruel. *Tenures* and the *forest laws* were the source of endless jealousies and discontents, and occasioned most of the public disorders, which broke out with such violence in these times. The forest laws were first introduced by the Conqueror, to protect his favourite diversion of hunting. It was not sufficient that this mighty hunter assigned certain tracts of land, the property of his subjects, to be converted into forest; that he dispeopled and made desolate whole districts of cultivated country; but, to secure the full enjoyment of it, he caused regulations to be framed, calculated to restrain and punish with severity every minute invasion of this new institution. The œconomy of the forest occasioned a number of grievous pe-

nalties: offences respecting vert and vension were punished with barbarous mutilations; and other delinquencies with fine and imprisonment. A regular series of courts was erected to be held at stated periods; in one of which the judges obtained the distinguished style of *Justices in Eyre*.

The fruits and consequences of the feudal constitution made another, and no small part of the grievances then complained of, and were borne with great impatience by both people. The English, who had voluntarily consented to the introduction of tenures, principally as a fiction affording a basis for a national militia, ill-endured the oppressive conclusions drawn from that establishment; conclusions which, with respect to them, had no foundation in reason or truth. Possessed of their land long before William entered the country, they revolted with indignation at the obligations by which they were now said to be bound to their lords. Feeling the burthens of this new state, they sighed after that freedom which they had enjoyed under their Saxon kings; and, in their discourses with the Normans, instilled into them a persuasion, that other conditions of society, and other institutions than those which they laboured under, would consist with a well-ordered government. Nor were the Normans themselves satisfied with the increasing burthens of their own polity, which had accumulated much beyond their original design in establishing it. It was little recompence to a great lord, that he could exercise the like sovereignty over his tenants which he himself suffered from the king; while the rear vassals, who were mostly English, without any power to compensate themselves, were in a state of society truly deplorable. These considerations united the nation in a common cause. The cry was for a restoration of the laws of Edward the Confessor, as a concise way of repealing all the late innovations.

But the abolition of a system to which the kingdom had conformed for some years, could

The charters.

hardly be obtained; to procure some alterations that would temper and abate the extreme evils complained of was as much as could be expected. This was done by *charters* granted by several of our kings.

Henry I. being possessed of the throne by a precarious title, endeavoured to conciliate the people by concessions of this kind. A formal charter was signed by the king. In this he abrogated, in general words, all abuses that had lately crept in; and declared, that no reliefs should be taken but such as were just and lawful. He disclaimed any right to exact money from his barons for licence to marry their daughters, or other females; and engaged to give all female wards in marriage by the advice of his barons. The dower of widows was secured; and the king engaged not to give them in marriage without their consent. The widow or some other relation was to have the custody of the lands and persons of their children. All barons were enjoined to act in the like manner towards their vassals.

Having made these, with other ordinances relating to crimes and punishments, he expressly confirmed the laws of Edward the Confessor, *cum illis emendationibus quibus pater meus eas emendavit concilio baronum suorum* (a). Thus were some branches of the feudal law, in a degree, checked in their growth, while the body remained firmly rooted and flourishing.

This charter was confirmed by Stephen (b), who granted another, merely to secure the liberties of churchmen; to which order he had been mostly indebted for the possession of the crown (c). The charter of Henry I. was also confirmed by Henry II. (d).

This charter, however, did not reach all the mischiefs that prevailed in the kingdom; nor were the provisions which it did contain faithfully observed. They, with all the rights of the people, were trampled on by succeed-

(a) Blac. Tracts, vol. 2. p. 8. (b) Ibid. p. 9. (c) Ibid. p. 10. (d) Ibid. p. 11.

ing monarchs. The unstable nature of government in these times made the condition of the people depend very much on the character of their kings; a circumstance which was happily experienced in the reign of John. With all that violence which hurried him on to sport with the liberties of a people, this prince wanted the firmness necessary to command respect and obedience; and while he excited their resentment by a wantonness of tyranny, he encouraged their resistance by his pusillanimity. Exasperated at repeated insults, his barons assembled, and with arms in their hands demanded of him a charter which might secure their property and persons from future invasions of power. A convention was soon held between the king and his people in an open field, called Runnymede, near Staines, in all the terrors of martial preparation. The king encamped, with some few adherents, on one side; the barons on the other. After some days of debate and consideration, the barons drew up a set of *capitula*, containing the heads of grievances, grounded upon the charter of Henry I. These, with some small qualifications to which they acceded, were then thrown into the form of a charter; to which the king affixed his seal.

This charter of king John, usually called *Magna Charta*, and the *Charter of Liberties*, is more full and explicit than that of Henry I. In this, reliefs were fixed at a certain sum; many regulations were made concerning wardship and marriage, the rights of persons, and the administration of justice; all which will be considered in the succeeding reign, when *Magna Charta* was confirmed, with some alterations, by Henry III.; this of Henry III. being the Great Charter, which is always referred to as the basis of our law and constitution; while the charter of John is only remembered as a monument of antiquity. One very striking provision of John's charter, which is omitted in that of Henry III. deserves our notice. It is there de-

elared, that no scutage or aid shall be levied on the subject *nisi per commune concilium regni nostri*; except in the three cases in which a feudal lord was entitled to the assistance of his vassal; namely, on marriage of his daughter, on making his son a knight, and to redeem his person from captivity; a restriction that was declared by the charter to hold good, not only between the king and his tenants, but between every lord and his tenants. In order to assemble the *commune concilium regni* to assess such scutages and aids, the king engaged to summon all archbishops, bishops, abbots, earls, and greater barons *sigillatim per literas*; *et præterea*, says he, *faciemus summoneri in generali per vicecomites, et ballivos nostros, omnes illos qui de nobis tenent in capite*; a passage that seems, beyond all controversy, to point out the constituent members of the great council of the kingdom in those days.

Several originals of this charter were executed by the king. It is said, that one was deposited in every county, or at least in every diocese. In pursuance of one of the provisions in the charter, twenty-five barons were elected as guardians of the liberties of the people, who were to see the contents of it properly executed; but the troubles that soon followed, from the want of faith in the king, prevented this scheme of reformation. The king died in the next year, and left the kingdom in all the horrors of a civil war.

Characters of these kings, as legislators. We shall now consider the kings whose reigns fall within this period, in their character as legislators. We have before seen, that William the Conqueror, besides confirming the laws of the Confessor, made some himself, which effected no inconsiderable alteration, by introducing tenures, and the trial by duel in criminal questions. Besides these express ordinances, he contrived all means of ingrafting the laws of Normandy upon the common law: for this purpose, he appointed all his judges from among his Norman subjects,

and made that language be taught in schools (*a*). By the constitution of his courts of justice, and every act of his administration, he did all in his power to change the jurisprudence of the country.

We hear nothing of Rufus as a legislator; nor are there any laws of Henry I. except his charter; but there is every reason to believe that the latter of these princes paid great regard to the improvement of the law. He was himself a man of learning, and had a disposition to quiet the minds of his subjects by a good administration; the laws, therefore, which go under his name may be considered as a compilation, at least, made in his reign, and as an instance of his attention to the subject of legislation.

The reign of Stephen was a period of continual war and disturbance, and of course gave little room for improvement in legal establishments. The introduction, however, of the books of canon and civil law must have contributed to the great advances made in the time of his successor, Henry II.; for, though there was always an extreme jealousy in the practicers of the common law, with respect to those two systems, it went no further than to an exclusion of their authority as governing laws: they were still cultivated by them as branches of the same science, and had a great effect in polishing and improving our municipal customs.

The wise administration of Henry II. operating on the advantageous circumstances concurring in the latter end of his reign, when all things were reduced to peace, contributed more to advance our legal polity than all the preceding times from the Conquest put together. Without recapitulating what has been before related, let any one compare the work of Glanville with the laws (or, as it might more properly be called, *the treatise of law in the time*) of Henry I. the great regularity in the order of proceeding, and the refinement with which notions of property

(*a*) Wilk. Leg. Sax. p. 289.

are treated, and he will see the superiority of the later reign in point of knowledge. It is probable, that the additions and amendments made in the law of this kingdom were by this prince transplanted into Normandy, and occasioned a still further improvement in the law of tenures; as lawyers were, by these communications, engaged in a kind of competition to enlarge and polish the same subject of inquiry. The whole of our municipal law was improved to a high degree during the reign of Henry II. and afforded an ample foundation for the superstructure raised on it in the time of Richard and John, and more particularly in the reign of Henry III.

It does not appear that Richard took any part himself in contributing to further the great designs of his father, in matters of municipal regulation, but left things to the course they had been put in by him. This prince, however, stands very high in the history of maritime jurisprudence. Upon his return from the Holy Land, while he was in the Island of Oleron, on the coast of France, he compiled a body of maritime law. This was designed for the keeping of order, and the determination of controversies abroad; and the wisdom with which it was framed, has been evinced by the general reception it has obtained in other nations (*a*). King John did nothing memorable in the way of legislation in this kingdom; though he has the praise of having first introduced the English laws into Ireland (*b*), where he instituted sheriffs and other officers to interpret and execute them. He likewise appointed a grand justiciary to preside over the administration of justice in that kingdom (*c*).

The monuments which remain of the jurisprudence of these times are not very numerous. They consist of some laws, charters, records, and law treatises.

(*a*) Black. vol. iv. p. 423.

(*b*) Quære, if not Henry II. Vid. Harris's Hibernia, part ii. p. 215. et seq.

(*c*) Tyrr. vol. ii. p. 809.

Of the laws of William the Conqueror, some are in Norman-French, and some in Latin. ^{Laws of William the Conqueror.} The first fifty *capitula* in Norman-French are what, Ingulphus says, he brought down to his abbey of Croyland, as those which the king had confirmed, and commanded to be observed throughout England(*a*). Though the time when they were enacted is not mentioned, it is tolerably clear, that it was not long after Ingulphus went to London on the affairs of his monastery, in the sixteenth year of William's reign. These therefore were, probably, such alterations and additions as he chose to make in the laws of Edward, which had been allowed in the fourth year of his reign(*b*). There follow some other laws of William in the form of a charter; and as the first mostly concern the criminal code, these latter constitute some alterations in the civil. These are in Latin, and go from the fifty-first chapter to the sixty-seventh inclusive. There are also some others in the form of a charter, which, together with the preceding, make, in all, eighty-one *capitula* of laws of William the Conqueror.

There are no laws remaining of William Rufus, if any were made; nor of Henry I. excepting his charter. Those that usually go under the title of laws of this king, and are entered in the Red Book of the exchequer, seem to have been reduced into that form by some person of learning, as containing a sketch of the common law then in use; a manner of entitling treatises not then uncommon; for there is now to be seen, in the Cottonian collection, a manuscript of Glanville, which bears the title of *Laws of Henry II*(*c*). There is no evidence that these laws were enacted by the great council, or granted by any charter. They contain ninety-four *capitula*, and are to be found in the collection of *Lambard* and *Wilkins*.

We have no remains of legislation in the time of Stephen. The laws of Henry II. are the Constitutions made at

(*a*) Ingulph.

(*b*) Tyrr. vol. ii, p. 69.

(*c*) Claud. D. 2.

Clarendon, anno 1164, and the statutes made at *Northampton*, anno 1176. The first fourteen of the Constitutions of Clarendon made several alterations in the civil and criminal part of our laws; the remaining sixteen concern ecclesiastical affairs, and contain those points which were disputed between Henry and Becket, and between this kingdom and the see of Rome.

Besides laws, there remain some public acts of this reign; as, *articles of enquiry concerning the extortion and abuses of sheriffs*, and *the assise of arms*. During the reigns of Richard and John, there are no laws which can be properly so called; but there are commissions and ordinances of a public nature respecting the administration of justice. In the reign of the former, there are some *articles of the crown*, with the *forms of proceeding in those pleas*; and *directions for preserving the laws of the forest* (a).

Besides the laws of these kings which have been mentioned, there are many other provisions made in these reigns, which may be found, arranged in the order of time in which they passed, in the *Codex Legum Veterum* intended for publication by Spelman, and now annexed to the end of Wilkins's *Anglo-Saxon Laws* (b).

The great monuments of this period are the *charters*. Under this title might indeed be reckoned those laws of William the Conqueror, which we have just noticed to have passed in that form. But the charters, properly so called, and which have become so famous on account of the object they all had in view, namely, the removal and redress of certain grievances, are the following: The charter of Henry I. containing eighteen chapters; that of Stephen, containing thirteen chapters; that of Henry II. containing only two chapters, and expressed in very general terms; the *Capitula Baronum*, being those heads of grievances which were proposed by the barons to John to

(a) Tyrr. vol. ii. p. 578. (b) See the Preface to Wilk. Ang. Sax. Laws

be redressed; and the *Magna Charta* of that king, drawn up in pursuance of them: these are all to be found in the late Mr. Justice Blackstone's correct edition of the charters (*a*), where that great ornament of English law has given a critical and very curious history of these valuable remains of antiquity.

The laws, or *assisæ*, as they were called, made at this early period, deserve a little further consideration. It has been before observed, that our law is composed of the custom of the realm, or *leges non scriptæ*, and the statutes, or *leges scriptæ*. Our lawyers have made a distinction among statutes themselves; they have distinguished between statutes made before the time of memory, and those made since. The time of memory has been fixed in conformity with a provision made in the time of Edward I. for settling the limitation in a writ of right; which was, by stat. 1 West. c. 39. fixed at the beginning of the reign of Richard. Though the limitation in a writ of right has been since altered, this period has been chosen as a distance of very high antiquity, at which has been fixed *the time of memory*, as it is called; so that every thing before that period is said to have happened before the time of memory.

Those statutes which were made before the time of memory, and have not since been repealed nor altered by contrary usage, or subsequent acts of parliament, are considered as a part of the *leges non scriptæ*; being, as it were, incorporated into, and become a part of, our common law: and notwithstanding copies of them may be found, their provisions obtain at this day, not as acts of parliament, but by immemorial usage and custom; of which kind is, no doubt, a great part of our common law (*b*).

Laws were termed sometimes *assisæ*, sometimes *constitutiones*. Though the most solemn and usual way of or-

(*a*) Black. Tracts, vol. ii,

(*b*) Hale Hist. 3, 4.

daining laws was to get the concurrence of the *commune concilium regni*, it should seem, that in these times the king took upon himself to do many legislative acts, which, when conformable with the established order of things, were readily acquiesced in, and became the law of the land. The very frame, indeed, of such laws as were sanctioned with all possible formalities, carried in them the strongest appearance of regal acts: if a law passed *concilio baronum suorum*, it was still *rex constituit* (a). Of the laws of William the Conqueror, though in some parts they seem to have the authority of the great council, *statuimus, volumus, præcipimus*; yet in others they speak in the person of the king only, *hoc quoque præcipio, et prohibeo* (b). The form of a charter, in which the king is considered as a person granting, was a very common way of making laws at this time; and this carries in it the strongest proof of the sentiments entertained in those ages concerning legislation: nevertheless it is to be remarked, that some of these charters, from the solemnities attending the execution of them, might be regarded as having all the validity of laws; as the charter of king John, to which the barons of the realm were parties. There were, however, several other charters which seem to have no authority but that of the sovereign. Indeed, several laws, or *assisæ*, even so low down as Henry II. and the reigns of Richard and John, vouch no other sanction but *rex constituit*, or *rex præcepit*, for every thing they command or direct.

There is no way of accounting for this extraordinary appearance of the old statutes, but by supposing the state of our constitution and laws to have been this: That the judicature of the realm being in the hands, and under the guidance of the king and his justices, it remained with him to supply the defects that occasionally appeared in the course and order of proceeding; which being founded ori-

(a) Vid. Schmidt der Deutschen. Geschichte, vol. I. 582. (b) Wilk. 217, 218.

ginally on custom and usage, was, in its nature, more susceptible of modification than any positive institution, that could not be easily tampered with, without a manifest discovery of the change. In an unlettered age, it was convenient and beneficial that the king should exercise such a superintendence over the laws as to declare, explain, and direct, what his justices should do in particular cases; such directions were very readily received as positive laws, always to be observed in future; and, no doubt, numbers of such regulations were made, of which we have at present no traces. While this supreme authority was exercised only in furtherance of justice, by declaring the law, or even altering it, in instances which did not much intrench upon the interest of the great men of the kingdom, it was suffered to act at freedom. But no alteration in the law which affected the persons or property of the barons could be attempted with safety, without their concurrence in the making of it; as, indeed, it could not always be executed without the assistance of their support. Thus it happened, that when any important change was meditated by the king, a *commune concilium* was summoned, where the advice of the *magnates* was taken; and then the law, if passed, was mentioned to be passed with their concurrence. On the other hand, had the nobles any point which they wanted to be authorised by the king's parliamentary concurrence, a *commune concilium* was called, if the king could be prevailed on to call one; and if the matter was put into a law, the king here was mentioned to have commanded it, at the prayer and request of his barons; so that, one way or other, the king is mentioned in all laws as the creative power which gives life and effect to the whole.

As laws made in the solemn form by a *commune concilium* were upon points of great importance, and often the subjects of violent contest; they were in the nature of concords or compacts between the parties interested, and were

sometimes passed and executed with the ceremonies suitable to such a transaction. The Constitutions of Clarendon (which too were called the ancient law of the kingdom, and therefore only to be declared and recognized as such), were passed in that way. Becket and all the bishops took an oath to observe those laws; and all, except Becket, signed, and put their seals to them. The laws were drawn in three parts. One counterpart, or authentic copy, was given to Becket, another was delivered to the archbishop of York, a third was retained by the king himself, to be enrolled among the royal charters (*a*). The *Magna Charta* of king John was executed with similar solemnity, and bore a similar appearance of a compact between the king and his nobles. It was not uncommon that the people, as well as the makers, should be sworn to observe laws; the *assise statuta, et jurata*, are mentioned by Bracton as an article of inquiry before the justices in eyre in the reign of Henry III.

The *rotuli annales*, or *great rolls of the pipe*, in which the accounts of the revenue were stated, are the most ancient rolls now remaining, and the series of them is perfect from the first year of Henry II. Besides this there is still remaining in the same archives, a *great or pipe roll*, which has been supposed to belong to the *fifth year of king Stephen*, but has been proved by Mr. Prynne and Mr. Madox (*b*) to be intitled to an earlier date; indeed, to belong to some year of Henry I.; and according to Mr. Prynne, to the 18th of that king.

The plea rolls of the Exchequer, now remaining, do not begin till the reign of Edward I. The oldest rules of the *curia regis* now extant begin with the first year of Richard I. as do the *assise rolls* of the justices itinerant. Those of the *bancum* begin with the first year of king John, which is very near the first establishment of that court. There

(*a*) Litt. Hen. II. vol. iv. p. 26.

(*b*) Mad. Hist. Dis. Epist.

are *charter rolls* of the chancery, of the first year of king John, and *close rolls*, *fine rolls*, *patent rolls*, *liberate rolls*, and *Norman rolls*, of the second, third and sixth year of that king. All the before-mentioned rolls, except the *great rolls of the pipe*, are said to be now in the Tower of London, and are the earliest specimens of records that have been spared by the joint destruction of time, wilfulness, and neglect. The cruel havock made by these enemies has occasionally excited a temporary attention to this important article, and measures have, in consequence, been pursued for preserving such muniments as remained. Such events, in the history of our records, will be mentioned in their proper places (a).

Among the records and valuable remains of Domesday antiquity we must not forget the famous *Domesday Book*. *day Book*, which, though not strictly a monument of a legal nature, yet has this connexion with the History of our Law, that it is said to have been made with a view to the establishment of tenures. This book contains an account of all the lands of England, except the four northern counties; and describes particularly the quantity and value of them, with the names of their possessors. King Alfred is said to have composed a book of this kind about the year 900, of which this was in some measure a copy. This work was begun in 1080, and completed in six years. It has always been esteemed of the highest authority, in questions of tenure; and is considered by antiquarians as the most ancient and most venerable record that now exists in this or any other kingdom. The *Black* and *Red Book of the Exchequer* (b) seem very little more connected with our an-

(a) See Ayloffe's Ancient Charters, Introd.

(b) Domesday Book is a document belonging to the Receipt of the King's Exchequer, and is in the Chapter-house at Westminster. It is in two volumes. For a more satisfactory account of this ancient record we must refer the Reader to a small quarto pamphlet, intitled, *A short Account of some Particulars concerning Domesday Book, with a View of its being published*. By a Member of the Society of Antiquarians. This is a performance of Mr. Webb, and was read at the Society in the year 1755.

cient laws than the foregoing work, except that in both of them was found a transcript of a law-treatise, which will be mentioned presently.

There are two treatises written in the reign of Henry II. which contribute greatly to illustrate the state and history of our law : the one is the *Dialogus de Scaccario* (a) before alluded to ; the other is the *Tractatus de Legibus Angliæ*, by Glanville.

The *Dialogus de Scaccario* has generally passed as the work of Gervase of Tilbury ; but Mr. Madox thinks it was written by Richard Fitz-Nigel bishop of London, who succeeded his father in the office of treasurer, in the reign of Richard I. and was therefore well qualified for such an undertaking. This book treats, in the way of dialogue, upon the whole establishment of the exchequer, as a court and an office of revenue ; giving an exact and satisfactory account of the officers and their duty, with all matters

In this little essay is brought together in one view all that had been said by former historians and antiquarians on the subject of Domesday.

By the munificence of parliament, *Domesday* has been printed ; but we must regret that this laudable regard of the legislature towards our ancient records has not been seconded by the common attention which has been paid to every other publication since the earliest times of printing. The reader will be surprised when he is told, that this book has no prefatory discourse, or index, not even a title-page, or the name of the printer : it is a mere *fac simile*, constituting a very large folio, full of abbreviations and signs, that cannot be understood without a key, and much previous information.

(a) *Liber Ruber* and *Liber Niger Scaccarii* are two miscellaneous collections of charters, treatises, conventions, the number of hides of land in several counties, escuages, and the like ; many of which, as well as the *Dialogus de Scaccario*, are to be found in both those books. The *Liber Niger* has been printed by Hearne, together with some other things, in two volumes 8vo ; of which the *Liber Niger* fills about 400 pages. He intitles it, *Exemplar vetusti codicis MS. (nigro velamine cooperti) in Scaccario, &c.* The collector of the contents of the *Liber Ruber* is supposed by Mr. Madox to have been Alexander de Swereford, archdeacon of Shrewsbury, and an officer in the Exchequer in the latter end of Henry II.

It seems as if the *Dialogus de Scaccario* had been considered as the whole of the *Liber Niger*, till the publication of Hearne ; and since Mr. Madox has pronounced Richard Fitz-Nigel to be the author of the Dialogue, and not Gervase of Tilbury, the whole of the *Liber Niger* has been given to Gervase, though it does not appear for what reason. The *Dialogus de Scaccario* is published by Mr. Madox, at the end of his History of the Exchequer. See Nicholson's Eng. Hist. p. 173. Hearne's *Liber Niger*, p. 17.

concerning that court, during its highest grandeur, in the reign of Henry II. This is done in a style somewhat superior to the law-Latinity of those days.

Glanville's book is of a very different sort: Glanville.
this is written without any of the freedom or elegance discoverable in the other; and has all the formality and air of a professional work. It is entitled, *Tractatus de Legibus et Consuetudinibus Regni Angliæ*; but, notwithstanding this general title, it is confined to such matters only as were the objects of jurisdiction in the *curia regis*. Having stated this as the limit of his plan, the author very rarely travels out of it. Glanville's treatise consists of fourteen books; the first two of which treat of a writ of right, when commenced originally in the *curia regis*, and carry the reader through all the stages of it, from the summons to the appearance, counting, duel, or assise, judgment and execution. In the third, he speaks of vouching to warranty; which, being added to the two former books, composes a very clear account of the proceeding in a writ of right for recovery of land. The fourth book is upon rights of advowson, and the legal remedies relating thereto. The fifth is upon actions to vindicate a man's freedom; the sixth, upon dower. The seventh contains very little concerning actions; but considers the subjects of alienation, descent, succession, and testaments. The eighth is upon final concords; the ninth, upon homage, relief, and services; the tenth, upon debts, and matters of contract; and the eleventh, upon attornies. Having thus disposed of actions commenced originally in the *curia regis*, in his twelfth book he treats of writs of right brought in the lord's court, and the manner of removing them from thence to the county court and *curia regis*; which leads him to mention some other writs determinable before the sheriff. In his thirteenth book he speaks of assises and disseisins. The last book is wholly upon pleas of the crown.

The subject of this treatise is all along illustrated with

the forms of writs; a species of learning which was then new; was, probably, brought into order and consistency by Glanville himself; and first exhibited in an intelligible way, and with system, in this book.

The method and style of this work seem very well adapted to the subject: the former opens the matter of it in a natural and perspicuous order; while the latter delivers it with sufficient simplicity and clearness. The latinity of it, however, may not satisfy every taste; the classic ear revolts at its ruggedness; and the cursory reader is perpetually impeded by a new and harsh phraseology. But the language was not adopted without design; the author's own account of it is this: *style vulgari, et verbis curialibus utens, ex industriâ, ad notitiam comparandam eis, qui hujusmodi vulgaritate minùs sunt exercitati* (a). The author seems not to be disappointed in his design even at this distance of time; for a person who reads the book through, cannot fail of finding in one place an explanation of some difficulty he may have met with in another: the recurrence of the same words and modes of speaking makes Glanville his own interpreter. When the style of Glanville is mastered in this way, it will appear that many obscure sentences have been rendered such, through too great an anxiety to express the author's meaning; and perhaps it will not be an affectation of discernment to say, that the plain English which it is thus attempted to convey, may be seen through the awkward dress which this Latinist has spread over it.

If Glanville confines himself to a part only of our law, he treats that part with such conciseness, and sometimes in so desultory a way, that his book is to be looked upon rather as a compendium, than a finished tract; notwithstanding which, it must be considered as a venerable monument of the infant state of our laws; and as such will always find reception with the juridical historian, when thrown aside by the practising lawyer.

(a) Prolog. ad finem.

It has been a general persuasion, that the writer of this book was *Ranulphus de Glanvillâ*, who was great justiciary to Henry II. This great officer, though at the head of the law, united in himself a political as well as a judicial character; and it seems, that Glanville was likewise a military man, for he led the king's armies more than once, and was the commander who took the king of Scots prisoner. It might therefore be doubted, whether a person of this description was likely to be the author of a law-treatise containing a detail of the practice of courts in conducting suits. There was a *Ranulphus de Glanvillâ* who was a justice itinerant (*a*), and who, it is said, was a justice in the king's court towards the close of this reign. If the author was really of this name, it may be doubted whether he was not the latter of these two persons. Perhaps, after all, this work might be written by neither, but may be ascribed to the great justiciary for no other reason than because he presided over the law at the time it was written, and might be the promoter of the work, and patron to its author. Whatever doubt there may be concerning the author, there is no question but it was written in the reign of Henry II. there are many internal marks to prove it to be of that period; and from one passage, it seems to have been written (*b*) after the thirty-third year of that king. If Glanville is the earliest writer in our law, from whom any clear and coherent account of it is to be gotten; this book is also said to be the first performance that has any thing like the appearance of a treatise on the subject of jurisprudence since the dissolution of the Roman empire (*c*).

When this book is considered with a view to the progress of our law, it makes a remarkable event in the history of the new jurisprudence. Notwithstanding the attempts

(*a*) Vid. Leg. Ang. Sax.

(*b*) Glanv. lib. 8. c. 2, 3.

(*c*) Barr. Ant. Stat. This is not true if the *Decretum* is to be considered as a treatise; for Henry II. came to the crown in 1154, and Glanville being written after the thirty-third year of his reign, could not appear till 1187. Now the *Decretum* was published by Gratian in 1149.

of William the Conqueror to introduce the Norman laws, and the tendency in the superior courts to encourage every innovation of that kind, not much had yet been done of a public and authoritative nature to confirm that law in opposition to the Saxon customs. The laws of William, excepting those concerning tenures and the duel, were in the spirit and style of the Anglo-Saxon laws; the same may be said of those which go under the name of Henry I. It is observed, that the Constitutions of Clarendon, made about the eleventh year of Henry II. are in the scope of them, as well as the style and language, more entirely Norman, than any laws or public acts from the Conquest down to that time(a). It was not, then, till the reign of this prince that the Norman law was completely fixed here; and when it was firmly established by the practice of this long reign, and had received the improvements made by Henry, then was this short tract drawn up for public use. It is probable this was done at the king's command, in order to perpetuate the improvement he himself had made, and to effect a more general uniformity of law and practice through the kingdom. The work of Glanville, compared with the Anglo-Saxon laws, is like the code of another nation; there is not the least feature of resemblance between them.

While the Norman law was establishing itself here, that nation gradually received an improvement of their own polity from us. The two nations had so incorporated themselves, that the government of both was carried upon the like principle, and the laws of each were reciprocally communicated; a consequence not at all unnatural, while both people were governed by one prince. Much more had been done, of late, in this country than in Normandy, for the promotion of legal science. It was not till after the publication of Glanville, and even of Bracton and Britton, that the Normans had any treatise upon their law. One was at length produced in the *Grand Coustumier*

(a) Mad. Exch. 123.

of *Normandy* (a); a work so like an English performance, that should there remain any doubt of its being formed upon our models, there can be none of the great similarity between the laws of the two nations at this time.

There are some ancient treatises and statutes in the law of Scotland, which bear a still nearer resemblance to our English law. The close agreement between Glanville and the *Regiam Majestatem* leaves no room to doubt that one is copied from the other; though the merit of originality between them has occasioned some discussion. An Essay has been written expressly on this subject, in which it is said to be clearly proved, by the internal evidence of the two books, that Glanville is the original. It is observed by that writer, that Glanville is regular, methodical, and consistent throughout; whereas the *Regiam Majestatem* goes out of Glanville's method for no other assignable reason than to disguise the matter, and is thereby rendered confused, unsystematical, and, in many places, contradictory (b). To this observation upon the method of the *Regiam Majestatem* it may be added, that, on a comparison of the account given of things in that and in Glanville, it plainly appears, that the Scotch author is more clear, explicit, and defined; and that he writes very often with a view to explain the other, in the same manner in which the writer of our *Fleta* explains his predecessor Bracton. This is remarkable in numberless instances all through the book, and is perhaps as decisive a mark of a copy as can be. The

(a) The *Coustumier of Normandy*, according to Basnage, could not have been composed till the reign of Philip the Hardy, who came to the throne in 1272, and reigned fifteen years; and our Edward I. came to the throne in 1272. Upon this statement of dates, it is possible, that it might be written after the time of Britton. The language seems to have a more modern form than that of Britton; though this must be attributed to some other cause than such a small space of time as could by any possibility intervene between the writing of these two books. *Oeuvres de Henri Basnage, Avertissement.*

(b) The Essay here alluded to is written by Mr. Davidson, of Edinburgh. Of this Tract I have not been able to get a sight, and am obliged to the preface to the new edition of Glanville for this account of it.

other Scotch laws, which follow the *Regiam Majestatem* in Skene's collection, contribute greatly to confirm the suspicion. These, as they are of a later date than several English statutes which they resemble, must be admitted to be copied from them; and so closely are the originals followed, that the very words of them are retained. This is particularly remarkable of the reign of Robert II. in which is the statute *quia emptores*, and others, plainly copied from our laws, without any attempt to conceal the imitation. These laws, at least, can impose upon no one; and when viewed with the *Regiam Majestatem* at their head, and compared with Glanville and the English statute-book, they seem to declare very intelligibly to the world, that this piece of Scotch jurisprudence is borrowed from ours (a).

The *Regiam Majestatem* is so called, because the volume opens with those words: the prologue to Glanville begins *Regiam Potestatem*. This whim of imitation is discoverable among our own writers. *Fleta* begins his Proœmium in the same way, and goes on, for several lines, copying word for word from Glanville. Indeed, the leading idea, in all, is taken from the Proœmium to Justinian's Institutes.

(a) It seems unnecessary to contend for the originality of the *Regiam Majestatem*, while a doubt of much more importance remains unsettled; this is, whether that treatise, as well as the others in the publication of Skene, are now, or ever were any part of the law of Scotland. Upon this point, some of the most eminent Scotch lawyers are divided. We find *Craig* and *Lord Stair* very explicit in their declarations against these laws, as a fabrication, and palpable imposition; on the other hand, *Skene* the editor is followed, among others, by *Erskine*, *Lord Kaims*, and *Dalrymple*, who continually refer to them, as comprizing the genuine law of Scotland in former times. That a large volume of laws, and law treatises, should be pronounced by persons of professional learning to be part of their law and customs, and should be as positively rejected by others, is a very singular controversy in the juridical history of a country; nor is it less singular, that this volume should bear such a close similitude with certain laws of a neighbouring state, whose legislature had no power to give it sanction and authority. While a fact of this sort continues unascertained, the history of the law of Scotland must be involved in great obscurity. See *Craigii Inst. Feud. lib. 1. tit. 8. sect. 7.* *Stair's Inst. fo. 3. tit. 4. sect. 27.* *Skene's Preface to the Regiam Majestatem.* *Erskine's Princ. Kaims' Historical Law Tracts; and Dalrymple's Feudal Property passim.*

The law-language of these times was *Latin* or *French*, but more commonly the former. The only laws of this time now subsisting in Norman-French, are those which compose the first collection of William the Conqueror. All the other laws from that time to the time of Edward I. are in Latin. There are some few charters of the first three Norman kings which are either in Anglo-Saxon or in Latin, with an English version; of which sort there are several now remaining in the Cottonian and other collections (a).

Without doubt the Norman laws of William were proclaimed in the county court in Anglo-Saxon, for the information of the English, who still continued to conduct business there in their own language, as they did in all inferior courts: but in the *curia regis* and *ad scaccarium* William obliged them to plead in the Norman tongue, as most consistent with the law there dispensed, and that which was best understood by the justices. However, notwithstanding this language was used in pleading and argument, all proceedings there, when thrown into a record, were inrolled in a more durable language, the Latin. This was the language in which all writs, laws, and charters, whether public or private, were drawn: so that the Norman tongue was of no extensive use here; nor was it till the time of Edward I. that French became of common use in the laws, parliamentary records, and law books; and this was not the provincial dialect of Normandy, but the language of Paris.

It is believed that few were learned in the laws Miscellaneous facts. before the Conquest, except the clergy. The warlike condition in which that people lived, and the extreme ignorance which universally prevailed among the laity, left very little ability for the management of civil affairs to any but the clergy, who possessed the only learning of the

(a) Tyrrell, ii. 101.

times; in the reign therefore of the Conqueror, in the great cause between *Lanfranc* and *Odo* bishop of Baieux, it was *Agelric* bishop of Chichester to whom they looked for direction. He was brought, says an ancient writer (a), in a chariot, to instruct them in the ancient laws of the kingdom, *ut legum terræ sapientissimus*. It was the same long after the Normans settled here.

In the time of Rufus, one Alfwin, rector of Sutton, and several monks of Abingdon were persons so famous for their knowledge in the laws, that they were universally consulted, and their judgment frequently submitted to by persons resorting thither from all parts (b). Another clergyman, named *Ranulph*, in the same reign obtained the character of *invictus causidicus*. So generally had the clergy taken to the practice of the law, at that time, that a cotemporary writer says, *nullus clericus nisi causidicus*. The clergy seem to have been the principal practicers of the law, and were the persons who mostly filled the bench of justice.

(a) Textus Roff.

(b) Dug. Orig. p. 21.

CHAP. V.

HENRY III.

*Magna Charta—Tenures—Alienation—Mortmain—
 Communia Placita non sequantur Curiam nostram—
 Justices of Assise—Amercements—Nullus liber homo,
 &c.—Præcipe in Capite—Sheriff's Criminal Judicature
 —The Writ de Odio et Atiâ—Charta de Forestâ—
 The Judicature of the Forest—Punishments—Charters
 confirmed—Statutum Hiberniæ—Statute of Merton—
 Of Commons—Of Special Bastardy—Ranks of Per-
 sons—Of Villenage—Of Free Services—Of Serjeanty
 —Scutagium—Homage and Fealty—Of Wardship and
 Marriage—Of Gifts of Land—by whom—to whom—
 Of Simple Gifts—Of Conditional Gifts—Estates by
 the Courtesy—Of Reversions—Gifts ad Terminum—
 Livery—Rights—Testaments—Ecclesiastical Juris-
 diction therein—Of Descent—De Partu Supposito—
 Of Partition—Dower.*

HAVING travelled through the early periods of our law, through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved, we approach the confines of known and established law. In the reign of Henry III. begins the order of statutes on which legal opinions may be founded with certainty. Whatever statutes were passed before this reign, and whatever remembrance we may have of them in annals and histories of the time, they are considered as little more than the remains of antiquity, that illustrate indeed the enquiries of the curious, but add nothing

to the body of legal learning. *Magna Charta*, and the statutes of Merton and Marlbridge, passed in this reign, lie within the pale of the English law, as now understood; and furnish topics for argument, and grounds for judicial decision. From this time, the history of our law becomes more authentic and certain. The constitutions now made, produced determined effects; we can trace in what manner they were afterwards altered and modified; can generally fix the æra of such alterations; and can always rest secure in the probability of our deductions, while we behold the consequences of them in the present state of our law.

If the statutes furnish authentic documents on which we may rely with confidence, the grounds and principles of the law are investigated and discussed by an author of this reign, whose work may be considered as the basis of all legal learning: the treatise of Bracton will enable us to speak decidedly and fully upon every title in the law, whether civil or criminal. The sketch we have just given from Glanville will now be filled up, and its deficiencies supplied; many of the obscure hints, the doubts, and ambiguities with which that author abounds, will be elucidated; and the whole of our law explained with consistency, and upon undeniable authority. These are the materials from which the juridical history of this king's reign is to be collected. For the matter which they furnish, it may not be raising the expectations of the reader too high, to promise him a full gratification of his thirst for legal antiquities, and the knowledge of judicial proceedings in all their branches. It is rather to be feared, that every one may not intirely assent to the reasons which induced us to enter so minutely into the detail of things; it is thought, however, that it would be less pardonable to give a scanty relation, where the sort of information which is most likely to engage the curiosity of a lawyer depends, very often, upon circumstances and passages apparently trifling.

The reign of this king, and the remainder of this History, will be divided, conformably with the nature of the materials from which it is formed, into the alterations made by statute, and those made by usage and the decisions of courts. These two sources of variation will be pursued separately, and the amendments made by either stated distinctly, and by themselves. We shall first consider the statutes, and then the decisions of courts. In the present reign, we begin with *Magna Charta*, 9 Hen. III. that being the earliest statute we have on record.

Henry III. in the first year of his reign, on the 12th of November 1216, being then only nine years old, by the advice of Gualo the pope's legate and of the earl of Pembroke, in the grand council of the realm renewed the Great Charter which had been granted by his father, together with such alterations and amendments as the circumstances of the times had made necessary (a). In the September or November following, a new *Magna Charta* was sealed by the pope's legate and the earl of Pembroke, with several additional improvements; at which time the clauses relating to the Forest were first thrown into a separate charter, making the *Charta de Foresta* (b).

When the king was declared of age, it was thought that so important an act of his infancy as this, should be confirmed; accordingly, in the ninth year of his reign he confirmed the act of the pope's legate and the earl of Pembroke; and granted *Magna Charta* and *Charta de Foresta* in the form in which they had sealed it, and as we now have them (c).

Thus was the text of *Magna Charta* and *Charta de Foresta*, after many alterations, finally settled; nor has there in succeeding times been any amendment made therein. The solicitude of later ages was to obtain frequent confirmations, and a strict observance of these grand

(a) 2 Bla. Tracts, ii. Intr. 42. (b) Ibid. p. 52. 60. (c) Ibid. p. 69.

pillars of our constitution; by occasional interpretations to explain any difficulties which might appear in the construction of them; and to enlarge the benefits they were designed to confer. What were the benefits, liberties, and advantages secured to the people by these famous charters, and what is the form and style in which they are conceived, it is now our business to enquire.

The copy of *Magna Charta* in our statute-book is taken from the roll of 25 Ed. I. and is only an *Inspeximus* of the charter of the ninth of Henry III. so called from the letters patent prefixed in the name of Edward I. *IN-SPLEXIMUS Magnam Chartam domini Henrici quondam regis Angliæ patris nostri de libertatibus Angliæ, in hæc verba.* Then follows *Magna Charta* nearly in the form of that granted by Henry III.

Magna Charta contains fifty-seven chapters, composing a rhapsody of ordinances for the settling or amendment of the law in divers particulars at that time anxiously contended for. The whole is strung together in a disorderly manner, with very little regard to the subject matter. If we were to judge, from the face of the instrument itself, of the chief design of the barons in obtaining this charter, we might be inclined to think, that their great object was to ascertain the services and burthens arising from tenures; for the first six chapters are wholly confined to that subject, and many others relate incidentally to the same point; the consequence of which is, that many parts of this famous charter have become obsolete, and, to a modern reader, almost unintelligible. Other parts of it, however, are extremely worthy of notice, even at this day; as they, at the time, contributed to confirm, if not establish, certain branches of our juridical constitution; and, what is more important, to lay down certain general principles, which have had an extensive influence on our law in all its branches ever since; as our civil liberty and private rights

became thereby better defined, and were considered as settled on the firm basis of parliamentary recognition.

To explain in what manner this was done, it will be proper to state at length the substance of *Magna Charta*; which we shall attempt in an order differing from that in which the text appears, but which will, perhaps, bring the contents of it into a clearer light than the original appears in. We shall first speak of such provisions as are of a more general or miscellaneous nature; then of those which relate to tenures and property; after which will follow the regulations ordained for the administration of justice.

The address and general preamble to the charter are deserving notice, as they shew the form in which these solemn acts were usually authenticated: it is addressed in the name of the king. "To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers; and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting. Know ye, that we, unto the honour of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of holy church, and amendment of our realm, of our mere and free will (a), have given and granted (b) to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following, to be kept in our kingdom of England for ever."

Such is the manner in which the provisions of *Magna Charta* are introduced; after which comes the first chapter, containing a general grant in the following terms: "First, we have granted to God, and by this our present charter have confirmed, for us and our heirs for ever, that the church of England shall be free, and shall have all her whole rights and liberties inviolable. We have granted also and given to all the *freemen* of our realm,

(a) *Spontaneâ et bonâ voluntate nostrâ.*

(b) *Dedimus et concessimus.*

“ for us and our heirs for ever, these liberties under-writ-
 “ ten, to have and to hold, to them and their heirs, of us
 “ and our heirs for ever.” What these liberties were we
 shall now enquire.

It was ordained, that the city of London shall have all the ancient liberties and customs which it had been used to enjoy ; and that all other cities and towns, and the barons of the cinque or other ports, should possess all their liberties and free customs (*a*). As many exactions had been made during the reigns of Richard and John for erecting bulwarks, fortresses, bridges, and banks, contrary to law and right ; it was declared, that (*b*) no town or freeman should be distrained to make bridges or banks, but only those that were formerly liable to such duty in the reign of Henry II. a period which was often referred to, as an example for correction of enormities, and the due observance of the laws. For the same reason, none were to appropriate to themselves a several right (*c*) in the banks of rivers, so as to exclude others from a passage there, or from fishing, except such as had that right in the reign of Henry II (*d*). All weirs in the Thames and Medway, and all over England, were to be destroyed, except such as were placed on the coast (*e*). One standard of weights and measures was established (*f*) throughout the kingdom.

A provision was made respecting merchant-strangers, which evinces how very early a regard was had to the interests of trade. Before this, it should seem, that merchant-strangers, though in amity, used to be laid under certain prohibitions (*g*) ; for it was now provided (*h*), that all merchants, unless they were before publicly prohibited, should have safe and sure conduct in the seven following instances : 1st, to depart out of England ; 2dly, to come into Eng-

(*a*) Mag. Chart. ch. 9. (*b*) Ch. 15. (*c*) Vid. Harg. Tracts, p. 7.
 de defensione repariæ, &c. (*d*) Ch. 16. (*e*) Ch. 23. (*f*) Ch. 25.
 (*g*) 2 Inst. 57. (*h*) Ch. 30.

land; 3dly, to tarry here; 4thly, to go through England, as well by land as by water; 5thly, to buy and sell; 6thly, without any manner of evil tolls; 7thly, by the old and rightful customs. But this was only while their sovereign was in amity with our nation; for, in time of war, merchant-strangers, being enemies, who were here at the beginning of the war, were to be attached, without harm of their body or goods, till it was made known to the king or his chief justiciar (*a*) how our merchants were treated in the enemy's country, and they were to be dealt with accordingly.

These are the provisions of the Great Charter that are not easily reducible to any of the following heads, to which we are now proceeding. We shall first speak of the regulations relating to tenures. If any earl, or ^{Tenures.} baron, or other person holding of the king in chief by knight service, died, and at the time of his death his heir was of full age, it was ordained, that he should have his inheritance upon paying the old relief; that is, the heir of an earl was to pay for his earldom 100*l.* the heir of a baron for his barony 100 marks, and the heir of a knight 100 shillings for every knight's fee; and so in proportion (*b*).

Notwithstanding these reliefs of baronies and earldoms are called the old relief, we have before seen, that in the time of Glanville such reliefs were not fixed by law, but depended on the pleasure of the prince, and therefore must have been a ground of continual discontent; the knight's relief here prescribed is the same as it was in Glanville's time (*c*).

In cases where the heir was within age at the death of his ancestor, it was provided (*d*), that the lord should not have the ward of him, nor of his land, before he had taken homage of him. This was in confirmation of the common law stated by Glanville (*e*), and was now enacted for

(*a*) *Capitali justiciario nostro.*

(*b*) Ch. 2.

(*c*) Vid. ant. 127.

(*d*) Ch. 3.

(*e*) Vid. ant. 129.

better security of heirs against their lords; namely, that before the lord should have benefit of the wardship, he should be bound to two things: 1st, to warrant the land to the heir; 2dly, to acquit him from service, and other duties to be done and paid to all other lords; both which the lord was bound to do, if he had accepted homage of his tenant. It was moreover declared, in confirmation likewise of the common law, that when such a ward came of age, that is, to twenty-one years, he should have his inheritance without relief, and without fine. Notwithstanding such heir within age was made a knight, and so might be judged fit to do the service of a knight himself, it was provided, that though this might discharge his person from ward, yet his land should remain in the custody of his lord till he came of age (*a*).

The obligation to restore the inheritance to the heir, without destruction or waste, was ascertained more precisely, though in the spirit of the old common law (*b*). It was enjoined (*c*), that the keeper of the land (that is, the guardian of such an heir within age) should only take reasonable issues, and reasonable customs and services, without making destruction and waste of his men, his villains, or his goods. Where a committee of the custody of the king's ward, whether he was the sheriff, as was then usual, or any other person, was guilty of waste or destruction, he was to make recompence; and the land was to be committed to two discreet men of that fee, who were to account for the issues. Likewise, where the king gave or sold the custody, and waste was done, the custody was to be forfeited, and to be committed to two persons of that fee, as before mentioned. It was also directed, that those who had the custody of the land of such an heir (*d*), should, out of the issues and profits thereof, keep up the houses, parks, warrens, ponds, mills, and other things ap-

(*a*) Mag. Chart. ch. 3.

(*b*) Vid. ant. 114, 115.

(*c*) Ch. 4.

(*d*) Ch. 5.

pertaining to the land, and should deliver to the heir, when he came of full age, all his land, stored with ploughs and other implements, at least in as good condition as he received it in. It was provided, that all the above-mentioned regulations should be observed in the custody of archbishoprics, bishoprics, abbies, priories, churches, and dignities vacant that belonged to the king; with this exception, that the custody of *them* was never to be sold. As to abbies not of the king's foundation, it was declared(*a*), that the patrons of them, if they had the king's charters of advowson, or had an ancient tenure or possession, were to have the custody of them during their vacancy.

In addition to these provisions it was moreover declared, as it had been before held at the common law, that heirs should be married without disparagement(*b*).

Several abuses of purveyance as well as of tenures were removed or corrected. No constable of a castle or bailiff(*c*) was to take corn or cattle of any one who was not an inhabitant of the town where the castle was, but was to pay for the same; and even if the owner was of the same town, it was to be paid for in forty days. No constable of a castle was to distrain a knight to give money for keeping castle-guard, if he would do it in person, or cause it to be performed by some other who was able, and he could shew a reasonable excuse for his own omission; if a person liable to castle-guard was in the king's service, he was, for the time, to be free from castle-guard(*d*). No sheriff or bailiff of the king was to take any horses or carts for the king's use but at the old limited price; i. e. says the statute, for a carriage and two horses, 10d. per day; for three horses, 14d. per day: the demesne cart, however, or such as was for the proper and necessary use of any ecclesiastical person, or knight, or any lord, about his demesne lands, was to remain exempt, as had been by the

(*a*) Mag. Char. ch. 33.

(*b*) Ch. 6. Vid. ant. 116.

(*c*) Ch. 19.

(*d*) Ch. 20.

ancient law. Again, neither the king nor his bailiffs or officers were to take the wood of any person for the king's castles, or other necessities to be done, but by the licence of the owner (*a*). These limitations upon services of tenure and upon purveyance were great benefits to the subject, and so far protected him against these arbitrary claims.

Certain declarations were made as to the nature of tenure, in some instances. The king's prerogative in cases of ward was declared in the following manner. If any held of the king in fee-farm (*b*), or by soccage, or in burgage, and held lands of another by knight's service, the king was not, by reason of such fee-farm, soccage, or burgage-tenure, to have the custody of the heir, nor of the land holden of the fee of another; nor was he to have the custody of such fee-farm, soccage or burgage, except knight's service was due out of the said fee-farm; nor was the king, by occasion of any petit serjeanty, by a service to pay a knife, an arrow, or the like, to have the custody of the heir, or of any land he held of any other person by knight-service (*c*); all which seem to be only more explicit declarations of what the common law was thought to be before (*d*).

It was deemed proper to guard against such conclusions as might be founded on the above, or on any other prerogative, in case of baronies escheating to the crown; it was therefore declared, that if any man held of an escheat, as for instance, of the *honour* (for so it was in such case called) of *Wallingford*, *Nottingham*, or any other escheat, being in the king's hands and being a barony, and died, his heir should give no other relief to the king than he did to the baron, when it was in his hands; nor should he do

(*a*) Mag. Char. ch. 21.

(*b*) That is, an inheritance with a rent reserved in *fee*, equal to, or at least a *fourth* of that for which the same land had been lett to *farm*.

(*c*) Ch. 27.

(*d*) Vid. ant. 115.

any other service to the king than he should have done to the baron. The king was to hold the honour or barony as the baron held it, that is, of such estate, and in such manner and form, as the baron held it; and he was not, by occasion of such barony or escheat, to have any escheat but of lands holden of such barony; nor any wardship of any other lands than what were holden by knight's service of such barony, unless he who held of the barony held also of the king by knight's service *in capite* (a); from which it appears, that he who held of the king must hold of *the person of the king*, and not of any honour, barony, manor, or seignory (b).

These provisions about tenures were followed by one which was designed for the preservation of tenures in their pristine vigour and importance. We have seen (c) what alteration had gradually taken place in the original strictness with which alienation of land had been restrained; so that as the law now stood where the tenure was of a common person, the tenant might in many cases make a feoffment of part thereof, either to hold of himself, or of the chief lord. A feoffment of the latter kind seemed no way prejudicial to the lord, who still saw the land in possession of a person who was his homager: but when the tenure was reserved to the feoffor, the homage, as far as regarded that portion of the land, passed from the lord to the feoffor. These subinfeudations, as they, in a degree, stript the mesne lord of his ability to perform his services, were found very prejudicial to the objects of the feudal institution; and therefore the following regulation was made (d), namely, that, for the future, no freeman should give or sell any more of his land, than so as what remained might be sufficient to answer the services he owed to the lord of the fee.

In what manner this prohibition affected tenants *in capite*, has been somewhat doubted. Some have held,

(a) Mag. Chart. ch. 31. (b) 2 Inst. 64. (c) Vid. ant. 43. 104, 105.
(d) Ch. 23.

that the law never allowed tenants *in capite* to alien without a licence from the king, and paying a fine : some, that after this act, land so aliened without licence was forfeited to the king. Others again held, that the land, in such case, was not forfeited, but was seised in the name of a distress, and a fine was thereupon paid for the trespass ; of which latter opinion is lord Coke. This question remained undetermined for the space of one hundred years, when it was settled by stat. 1 Ed. III. c. 12. which declares, that the king should not hold such land as forfeit, but that a reasonable fine should be paid in the chancery.

But in the case of common persons who aliened in violation of this prohibition, the law was different ; for it is the common opinion, that the act was interpreted in this manner ; when a tenant aliened part of his land contrary to this act, the feoffor himself, during his life, could not avoid it ; but his heir, after his decease, might avoid it by force of this act ; but if the heir had joined with his ancestor in the feoffment, or had confirmed it, neither he nor his heirs could ever avoid it ; and if the heir had entered under the sanction of this act, the alienee of part might plead, that the service whereby the land was holden, could be sufficiently provided for out of the residue ; upon which issue might be taken. There are many precedents where this provision had been so tried, before the statute of *quia emptores*, 18 Ed. I. which repealed this prohibition, and gave every one free liberty to alien his land in part, or in the whole (a), with a reservation of the services to the chief lord.

Mortmain. Other means by which the end of tenures was defeated, were alienations in mortmain ; for in consequence of these, the military service decayed, and lords lost their fruits of tenure. Lands given to religious houses continued in an unchangeable perpetuity, without descent to an heir ; and therefore never produced the casualties of wardships, escheats, relief, and the like. On

(a) 2 Inst. 66.

this account many landholders would insert a clause in the deed of feoffment, *quòd licitum sit donatori rem datam dare, vel vendere cui voluerit, exceptis VIRIS RELIGIOSIS* (a). It was now endeavoured to put a stop to these gifts by a general provision; which was conceived in a way best calculated to meet the devices then made use of to elude the force of restrictions like that just mentioned. It was ordained, that (b) it should not, for the future, be lawful for any one to give his land to a religious house, and to take back again the same land to hold of that house; nor, on the other hand, should it be lawful for a religious house to take lands of any one, and lease them out to the donor. Moreover, if any one was convicted of giving his land to a religious house, the gift was to be void, and the land was to accrue to the lord of the fee. This provision is abridged, and the effect of it declared by the statute of mortmain in the next reign (c). "Of late," says that act, "it was provided, that religious men should not enter into the fees of any, without licence and will of the chief lord of whom such fees be holden immediately;" because if they did, the lord would claim them as forfeit. It is plain from this chapter of *Magna Charta*, particularly from this exposition of it, that gifts of land to religious houses were thereby prohibited generally, that is, even in cases where the religious house did not give the land back to hold of the house, but kept it to themselves in their own hands (d).

Among other severities attending the condition of tenures, that which related to the dower and marriage of widows was not the least. It seems from the following passages that some impediments were thrown in the way of their just rights, which are not noticed in any document we have hitherto met with. It was declared, that a widow (e), immediately after the death of her husband,

(a) Bract. fol. 13. (b) Ch. 36. (c) 7 Ed. I. (d) 2 Inst. 74, 75. (e) Ch. 7.

should, without any difficulty, have her *maritagium* (a), and inheritance; and should give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of her husband's death; by which must be meant some estate in *frank-marriage*, or *conditional fee*. She was, moreover, to continue, if she pleased, in the chief house of her husband, unless it was a castle, for forty days (called her *quarantine*) after his death; within which time her dower, if not assigned before, was to be assigned to her: and when she departed from the castle, a competent house was forthwith to be provided for her, where she might have an honourable residence till the assignment; and in the mean time she was to have reasonable estovers of common. For her dower she was to have assigned to her a third part of all the lands of her husband which were his during the coverture, unless where it happens that she was endowed of less at the church-door. By this description, the widow's dower was enlarged; for in the time of Glanville, it was to be a third of such land

(a) Lord Coke interprets this passage thus: "Widows are without difficulty to have their marriage (that is, to marry where they will, without any licence or assent of their lords) and their inheritance," &c. a construction which has two strong reasons against it. For, first, *maritagium* is generally used by the writers of this period for an estate in *frank-marriage*, and coupled as it here is with *hereditas*, it seems to require that sense. 2dly, This construction is directly contrary to the latter part of this very chapter of *Magna Charta*, where it is expressly declared that widows *shall not* marry without the assent of their lord. Indeed, lord Coke found it convenient to comment away the meaning of this passage also, which he has done in these words: "That is to be understood where such licence of marriage in case of a common person was due by custom, prescription, or special tenure; and this exposition is approved by constant and continual use and experience, *et optimus interpretis legum consuetudo*." (2 Inst. 18.) The latter position I admit most fully, and beg leave, upon the authority of it, to oppose the testimony of Bracton and Britton to that of our author. It is laid down by both of those writers, as will be shewn in its proper place, that this was the general law of the land; though I do not mean to dispute, but that the law in lord Coke's time might be as he has delivered it in this place. This is one strong instance, among many others, that our best writers have fallen into the error of canvassing points of ancient law upon principles and ideas wholly modern.

only as the husband had at the time of the espousals (*a*). It was ordained, that no widow should be distrained to marry, if she chose to live single; provided she would give security not to marry without the licence and assent of the king, if she held of the crown; nor without the assent of her lord, if she held of a common person: which last provision was in conformity with the spirit of the common law (*b*).

These points concerning tenures, and the incidents of landed property, were ascertained by the Great Charter. The remainder of this ancient piece of legislation is taken up in reforming the modes of redress, and regulating the administration of justice.

Nothing more required mitigation than the rigour with which the king's debts were in those times exacted and levied. This made it necessary to declare (*c*), that neither the king nor his bailiffs should seize any land or rent for a debt, so long as the goods and chattels were sufficient, and the debtor was ready to satisfy the demand. Further, the pledges of such a debtor, says the statute, shall not be distrained, so long as the principal is of sufficient ability; they are only to be answerable in his default; and they may, if they please, have the lands and rents of the debtor to reimburse themselves whatever they have paid for him.

Where the king's debtor dies, the king is to be preferred in payment of debts by the executor. If, says the charter, any one that holds of the king a lay fee (*d*) should die, and the sheriff or bailiff shews the letters patent of the king's summons for a debt due to the king, the sheriff or bailiff may attach and inventory all the goods and chattels of the deceased that are found within the fee, to the value of the debt, by the *view* (*e*) of lawful men; so that nothing may be removed till the king is satisfied; and

(*a*) Vid. ant. 100.

(*b*) Vid. ant. 117.

(*c*) Ch. 8.

(*d*) Ch. 18.

(*e*) *Per visum legalium hominum.*

after that, the residue is to remain to the executors, to perform the will of the deceased: if nothing is due to the king, then all the chattels are to go to the use of the defunct (that is, to his executors or administrators), saving, says the statute, to his wife and children their reasonable parts; the latter part of which provision does not seem to remove any of the difficulties which were before noticed in the text of Glanville upon the subject of testaments (a).

A very plain rule of the common law was enforced by a declaration (b), that no man should be distrained to do more service for a knight's fee, or for any freehold, than was properly due. This provision would not have been necessary, unless the remedy by distress had been lately abused, to compel a compliance with unjust demands.

The most interesting part of this famous charter, as viewed by a modern reader, are the provisions for a better and more regular administration of justice. The effects of these are seen even in the present shape of our judicial polity, to the formation of which they contributed very considerably.

The first of these regulations ordains, that *Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco* (c);

the sense of which ordinance is, that suits between party and party shall no longer be entertained in the *curia regis* (whose style, during this reign, was properly *placita quæ sequuntur regem*,) which always followed his person, and might be held in several different places in the space of one year, to the great inconvenience of suitors, jurors, witnesses, and others; but shall be debated in some certain stationary court, where persons concerned may resort at all times for prosecuting and defending their suits.

The operation of this provision must have had an immediate influence upon the two great courts of the king; namely,

(a) Vid. ant. 111, 112. (b) Ch. 10. (c) Ch. 11. Vid. ant. 57.

that held before himself, and that which, though a part of it, was called the exchequer; for as both these attended the king wherever he resided, all suits there between parties were interdicted by the words of this law; and the former remained a tribunal for discussion of criminal matters only; the latter for the cognisance of causes concerning the revenue; while common pleas, as they were to be held in some certain place, seemed, naturally enough, to devolve upon the *bench*, or *justitiarum de banco*, which had been lately established at Westminster, in aid of the two former courts, as we have before seen. From this period, the bench, or, as the return was, *coram justitiariis nostris apud Westmonasterium* (to distinguish it from the king's court, which sat at the Tower, and removed with his person), grew into more consideration; and in after-times, as it became the sole and proper jurisdiction for *communia placita*, was thence denominated *the common-pleas*. In what manner the other two courts recovered a sort of cognisance in common suits between parties, by means of different fictions, will be seen hereafter.

It was endeavoured to render the proceeding by assise still more expeditious, by ordain-
Justices of
assise.
 ing justices to go a circuit once every year to take assises, instead of waiting till the justices itinerant came; which latter were perhaps not very regular, or, at least, not wished by the great barons to be very regular in their circuit, as they exercised a jurisdiction of a magnitude and extent that controuled the franchises of lords who had inferior courts. The statute (a) directs, that assises of *novel disseisin* and of *mortauncestor* shall not be taken but in their shires; whereas we have seen, that writs of assise and mortauncestor were returnable in Glanville's time *coram me vel justitiis meis* (b), in the *curia regis*, or court before the king; but this was now altered, and they were for the future to be taken in the following manner. The king, or, in his absence out of the realm, the chief justiciar, was to

(a) Ch. 12.

(b) Vid. ant. 178, 190.

send justices into every county once a-year; and these, together with the knights of the county, were to take the assises there (a). Such matters as the justices could not determine on the spot, were to be finished in some other part of the circuit; and such as, on account of their difficulty, they could not determine at all, were to be adjourned before the justices of the bench, and there decided. This is said to be the first appointment of *justices of assise*; in consequence of which these writs were ever after made returnable *coram justitiariis nostris ad assisas, cum in partes illas venerint, &c.* Assises *de ultimâ præsentatione* (b), which hitherto had been taken in the king's courts, that is, *coram me vel justitiis meis*, were, for the future, to be heard before the justices of the bench only, and there finally determined; a provision which may be thought to be founded in abundant caution, when it had been before declared, that common pleas, of which this was certainly one, should not follow the king's court.

While order was taken for ascertaining and governing the king's courts, some attention was given to the jurisdiction of the sheriff, where matters of less moment were agitated with some solemnity. The county court was to be held (c) only from month to month, that is, not more frequent than once a month; and in counties where the interval of its sitting had been greater, that was still to continue. The sheriff or his bailiff was not to hold his tourn in the hundred more than twice a-year, namely, after Easter and Michaelmas, and that in the usual and accustomed place; and the view of frank-pledge was to be held by the sheriff at Michaelmas. This last provision

(a) By the charter of John, the knights *associated* with the justices were to be four, chosen by the county; and the assises were to be taken on the day, and at the place of the county court. This delegation of four by the county reminds us of the ancient practice, when judgments were given *per omnes comitatûs probos homines* *. The later practice seemed to have been considered as the representative of such ancient tribunal; for in the *Capitula Baronum* they stipulated, that none else (except the jurors and parties) should be summoned to the taking of such assises †. This is probably the origin of the present *association* in the commission of assise.

(b) Ch. 13.

(c) Ibid. 35.

* Vid. ant. 84.

† Vid. Black. Chart. vol. II. Cap. Bar. 8.

was in order to keep up the old constitution so admirably contrived for preserving the peace, and the due order of the decennaries. It was enjoined, that all mens' liberties should be maintained as in the reign of Henry II.; and that the sheriff should take no more for his frank-pledge than was allowed in that reign. It is cautioned, in this same chapter, that the sheriff should seek no occasion or pretence either for holding his court oftener than is there directed, or taking any unreasonable fees. These injunctions about the sheriff's court were dictated probably by the jealousy that lords of franchises entertained concerning their own courts, with which the sheriff too much interfered.

The practice of courts was considered, and the usage of the common law in some instances ^{Amercements.} was adjusted and confirmed. It was endeavoured, by declaring the law more fully on that subject, to prevent all abuse of the *misericordia*, or amercement, which we have had such frequent occasion to mention. A freeman, says the statute (a), shall not be amerced for a small default but after the manner of the default; and for a greater in proportion thereto, saving to him, in the language of Glanville, his *contenement*, or *countenance*: with respect to a merchant, saving to him, in like manner, his merchandize; and to a villain, except he was the king's villain, his wainage: from which provisions it appears to have been the intention, that these amercements should not be the complete ruin of a man. For the same reason also it was declared, that none of the said amercements should be assessed but by the oaths of honest and lawful men of the vicinage. Earls and barons, however, were not to be amerced but by their peers (which was done either by the barons of the exchequer, or in the court *coram rege*, in both which the *pares regni* were constitutionally judges (b), and according to their default (c); nor was a clerk to be amerced in proportion to his spiritual benefice, but after his lay-tene-

(a) Ch. 14.

(b) Bract. fol. 116. b.

(c) *Delicti*.

ment, and, in like manner, only according to his default (a). All these provisions (b) were only to affirm and give a sanction to ancient usages, some of which have been before mentioned: upon this chapter, however, was afterwards framed the writ *de moderatâ misericordiâ*, for giving remedy to a party who was excessively amerced.

The form of trial was intended to be adjusted by the following regulation, though the precise meaning of it has occasioned some doubt: *Nullus ballivus de cætero ponat aliquem ad legem manifestam, nec ad juramentum simplici loquelâ suâ, sine testibus fidelibus ad hoc inductis* (c). Whether this means, that the defendant should not discharge himself by his own oath alone, without the oaths of other persons swearing to their belief of his assertion; or, that no defendant should be put to wage his law, unless the plaintiff supported his *loquela*, or declaration, by credible witnesses; or, as they were afterwards called, *sectatores*; has been a question with some writers. Several passages in Bracton seem to favour the latter opinion; and Fleta explicitly declares this to be the meaning of the provision (d); if so, most probably the practice of bringing into court the *sectatores* of the plaintiff, was established by this clause (e). The defendant making his law by the oaths of others swearing with him, was an old usage (f), in criminal cases at least, and as such is mentioned by Glanville; but it is not spoken of at all by that writer as a mode of proof for a defendant in civil suits; though we shall have occasion to mention it frequently in that light upon the authority of Bracton. From the manner in which the latter author speaks of a defence *per legem*, it seems to have been long in use; and from this passage in *Magna Charta*, we must conclude that it had been adopted from criminal to civil actions shortly after the time of Glanville. The *sectatores*, in this sense, constitute another novelty, of

(a) *Delicti*.

(b) Vid. ant. 157.

(c) Ch. 28.

(d) Flet. 137.

(e) Vid. ant. 85. in the note.

(f) Vid. ant. 195. 198.

which there is no mention in Glanville. When it had become the practice to admit *sectatores*, for so they also were called, to make the defence, it appeared reasonable enough to require, as *Magna Charta* here does, that certain persons should, in like manner, be brought to make out the plaintiff's case. It may be conjectured from the name, that both these sets of persons were originally chosen from the *sectatores*, or suitors of court, who were there present, ready to transact such business of the court as might arise.

Of all the provisions made by this charter *Nullus liber* for the security of the person and property of *homo, &c.* the subject, none has so much engaged the attention and claimed the reverence of posterity as chap. 29, which contains a very plain and explicit declaration as to the protection every man might expect from the laws of his country. *Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruat. Nec super eum ibimus* (says the statute in the name of the king), *nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ*; "nor will we take possession of his effects, but by "the judgment of his peers" (which, as in another chapter, had in view the *comites et barones* (a), and not the trial by jury, as has been commonly but erroneously supposed), "or by some other legal process or proceeding adapted "by law to the nature of the case." The statute goes on and says, *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*; whereby the king in his own person declares, that he will neither sell, deny, or delay to any man a due administration of the law (b).

(a) Vid. ant. 247.

(b) Lord Coke conceives *ibimus* to signify the process of the court *coram rege*, and *mittemus* that of any court which derives its authority from a writ sent to it. But these words have a technical sense in the civil law, which fully and more simply explains their meaning here. *Ire in bona alicujus dicuntur, qui in rerum possessionem a magistratu mittuntur*. Calv. Lex. Jur. Ire. As the former expressions in this chapter apply to the person and the freehold, it seemed natural to add such as would protect

Præcipe in capite. Among the regulations for the administration of justice, must be mentioned that respecting the writ of *præcipe in capite*; *breve quod dicitur*, says the charter, *Præcipe in capite de cætero non fiat aliqui de aliquo libero tenemento, unde liber homo perdat curiam suam*. We have seen, that, in Glanville's time (a), the regular way was, that for land held of a private lord suits should be commenced in the lord's court, and that only writs concerning land held *in capite* should be returnable in the king's court. This course seems to have been sometimes not adhered to, and a writ of *Præcipe* for lands held of a private lord used to be brought sometimes in the *curia regis*, as if the land was held *in capite*. It was to prevent this prejudice to the lord's court, that the above provision was made; and since that, all writs of right of land held of any other than the king, have been invariably brought in the lord's court, though they might afterwards be removed by *pone*. That this provision was aimed only at writs of right, and not at other *præcipes*, is expressly declared by Bracton (b).

These were the regulations ordained for the settlement and improvement of our law relative to property, and the administration of civil justice. Some few provisions were made regarding our criminal law, though not of the same magnitude with the former.

Sheriff's criminal judicature. As the distribution of justice, particularly that which concerns the lives and persons of individuals, should be in the hands of persons not only of discretion and judgment, but also well versed in the law, it was thought proper to ordain (c), that no sheriff,

the goods and chattels. The trial by jury was never spoken of in these days as *judicium*, much less *judicium parium*. We hear of *veredictum*, *juramentum legalium hominum*, *jurata vicinæ*, and the like, all expressive of some sworn truth, or of the persons who swore it coming from the *vicinæ*. Whereas the *pares regni* gave judgment, and not upon oath; so did the *sectatores*, in the county and other courts, who were the *pares* to all *liberi homines de comitatu*; and these latter came from the body of the county, and not from the *vicinæ* *.

(a) Vid. ant. 172.

(b) Bract. fol. 281.

(c) Ch. 17.

* Vid. ant. 84, 85.

constable, coroner, or other bailiff of the king, should hold pleas of the crown: it is held, that (a) by this provision, the authority of the sheriff to hear and determine theft and other felonies was entirely taken away. But this alteration could not have been made by force of this statute alone; it must be remembered, that, in the time of Glanville, theft was not among the *placita coronæ*, but was tried by the sheriff (b). In the time of Bracton, we find it was reckoned among the *placita coronæ*; and this change of its nature was necessary, before the present clause of *Magna Charta* could have the effect of removing it from the jurisdiction of the sheriff, as a plea of the crown. Whether this new denomination took place before or after the passing of *Magna Charta*, or in what period between the times of Glanville and Bracton, it is not easy or necessary to determine. This provision has been construed to apply only to hearing and determining; and therefore it was held, that the sheriff's power to take indictments of felonies and misdemeanors, as well as the coroner's to take appeals, still remained unimpeached; and in truth both were exercised for many years after, till a particular statute (c) was made to abolish the last remains of the criminal jurisdiction belonging to these ancient common-law judges.

It was declared, that a woman should not bring any appeal of death, except of the death of her husband, in the following words (d): "No one shall be taken or imprisoned on account of the appeal of a woman brought for the death of a man, except for the death of her husband;" which is one, among many other articles of this statute, that is only a confirmation of the common law (e).

(a) 2 Inst. 32. (b) Vid. ant. 128. (c) 1 Ed. IV. c. 2. (d) Ch. 34.

(e) Lord Coke, in his Commentary on this chapter, has laid it down, that a woman before this statute might have an appeal of the death of any of her ancestors; but this opinion seems to have no foundation, and what has been laid before the reader in another place, shews the law to have been quite otherwise. Vid. ant. 199, 200. 2 Inst. 68.

The writ *de odio et atia*. The writ *de odio et atia* was rendered more attainable than it had hitherto been. It was ordained that this writ, in future, should issue *gratis*, and should never be denied (a). This is the first mention of this writ by name, though it has been alluded to in a former part of this History (b). This writ was one of the great securities of personal liberty in those days. It was a rule, that a person committed to custody on a charge of homicide, should not be bailed by any other authority than that of the king's writ; but to relieve a person from the misfortune of lying in prison till the coming of the justices in eyre, this writ used to be directed to the sheriff, commanding him to make *inquisition*, by the oaths of lawful men, whether the party in prison was charged through malice, *utrùm rettatus sit odio et atia*; and if it was found that he was accused *odio et atia*, and that he was not guilty, or that he did the fact *se defendendo*, or *per infortunium*, yet the sheriff, by this writ, had no authority to bail him; but the party was then to sue a writ of *tradas in ballium*, directed to the sheriff; whereby he was commanded, that, if the prisoner found twelve good and lawful men of the county who would be mainpernors for him, then he should deliver him in bail to those twelve. The writ, or inquisition *de odio et atia* had a clause in it, *nisi indictatus vel appellatus fuerit coram justitiariis ultimo itinerantibus*; so that the inquisition was not in such case to be taken (c). We see how important it was, that this writ should be attainable with as little expence and trouble as possible, to avoid the oppression of malicious prosecutors.

As to the forfeiture and escheat of lands for felony, it was declared, that the king would not hold them for more than a year and a day, and then they should go to the lords of the fee (d); which was nothing more than the language of the law before (e).

(a) Ch. 26. (b) Vid. ant. 198. (c) Bract. 122, b. 123, a. b.

(d) Ch. 22. (e) Vid. ant. 120.

It was declared, that escuage should be taken (a) as it was wont in the reign of Henry II. This is the last provision of this famous charter; and is followed by some general declarations and renunciations dictated by the solemnity of the occasion. The liberties and free customs belonging to all persons, spiritual or temporal, are saved; and the king declares, that "all the customs and liberties
" aforesaid, which we have granted to be holden within
" this our realm, as much as appertaineth to us and our
" heirs, we shall observe; and all men of this our realm,
" as well spiritual as temporal, as much as in them is, shall
" observe the same against all persons in like wise." For this grant of their liberties, the barons, bishops, knights, freeholders, and other subjects, granted a subsidy; and then, says the king, "we have granted to them, for us and
" our heirs, that neither we nor our heirs shall attempt
" to do any thing whereby the liberties contained in this
" charter may be infringed and broken. And if any thing
" should be done by any one contrary thereto, it shall be
" held of no force or effect."

To these solemn and repeated declarations respecting the sanctity of this charter of liberties, is added *hiis testibus*, containing a list of the greatest names in the kingdom: for as in these times no grant of franchises, privileges, lands, or inheritances passed from the king but by the advice of his council, expressed under *hiis testibus*, this was thereby rendered an act of the king, attended with every formality that could possibly render it binding. In this consideration of it, it is properly *charta*, or a charter; though in that form it received likewise the authority of parliament. To the end of the charter, as it stands in the statute-book, is subjoined the confirmation of it before mentioned to have been made in the 25th year of Edward I.

(a) Ch. 37.

Charta de Foresta. The *Charta de Foresta* is likewise taken from the roll of 25 Edward I. and has a confirmation of that date prefixed to it, similar to that prefixed to *Magna Charta*. This charter, though of infinite importance at the time it was made, contains in it nothing interesting to a modern lawyer, any further than as it gives some specimen of the nature of the institution of Forest Law, and the burthens thereby brought on the subject. In this light, the Charter of the Forest is a curious remain of ancient legislation. It contains sixteen chapters.

The first chapter of this charter directed that all forests which had been afforested by Henry II. should be viewed by good and lawful men; and if it was proved that he had any woods, except the demesne, turned into forest, to the prejudice of the owner's wood, it was to be forthwith disafforested; but the royal woods that had been made forest by that king, were still to remain, with a saving of the common of herbage, and other things which any one was before accustomed to have (*a*). This was the provision in relation to the forests made by Henry II. As to those made by the kings Richard and John, they, unless they were in the king's own demesnes, were to be forthwith disafforested (*b*). The charter directed, that all archbishops, bishops, abbots, priors, earls, barons, knights, and free tenants, having woods in forests, should have them as they enjoyed them at the first coronation of Henry II. and should be quit of all purprestures, wastes, and assarts, made therein before the second year of Henry III. (*c*) Thus far were limits fixed to the extent of forests; and after these provisions a clause is added, by which all offences therein were pardoned.

In point of regulation it was ordained, that regards, or rangers, should go through the forest to make their regard, or range, as was the usage before the first coronation of

(*a*) Ch. 1.

(*b*) Ch. 3.

(*c*) Ch. 4.

Henry II. (a) The inquisition, or view for the *lawing* or *expeditation* of dogs, was to be had when the range was made, that is, from three years to three years; and then it was to be done by the view and testimony of lawful men, and not otherwise. A person whose dog was found not *lawed*, was to pay three shillings. No ox was to be taken for *lawing*, as had been before customary; but the old law in this point of *expeditation* was to be observed, namely, that three claws of the fore-foot should be cut off by the skin: and, after all, this *expeditation* was to be performed only in such places where it had been customary before the first coronation of Henry II. (b) It was ordained that no forester, or bedel, should make scotal, or gather gerbe, oats, or any corn (c) whatever, nor any lambs, or pigs; nor make any gathering at all, but upon the view and oath of twelve rangers, when they were making their range. Such a number of foresters was to be assigned, as should be thought necessary for keeping the forest (d). It was permitted to every freeman to agist his own wood, and to take his pannage within the king's forest; and for that purpose he might freely drive his swine through the king's demesne woods; and if they should lie one night in the forest, it should be no pretence for exacting, on that account, any thing from the owner (e). Besides the above use of their own woods, freemen were permitted to make in their woods, land, or water within the forest, mills, springs, pools, marlpits, dikes, or arable grounds, so as they did not inclose such arable ground, nor cause a nuisance to any of their neighbours (f): they might also have ayries of hawks, sparrow hawks, falcons, eagles, and herons; as likewise the honey found in their own woods (g). Thus was a degree of relaxation given to the rigorous ordinances of William the Conqueror, who had

(a) Ch. 5.

(b) Ch. 6.

(c) *Bladum*.

(d) Ch. 7.

(e) Ch. 9.

(f) Ch. 12.

(g) Ch. 13.

appropriated the lands of others to the purpose of making them forest; the owners thereof were now admitted into a sort of partial enjoyment of their own property.

It was permitted that any archbishop, bishop, earl, or baron, coming to the king, at his command, and passing through the forest, might take and kill one or two of the king's deer, by view of the forester if he was present; if not, then he might do it upon the blowing of a horn, that it might not look like a theft. The same might be done when they returned (*a*). No forester, except such as was a forester in fee, paying a ferm for his bailiwick, was to take any chiminage, as it was called, or toll for passing through the forest; but a forester in fee, as aforesaid, might take one penny every half-year for a cart, and a halfpenny for a horse bearing a burthen; and that only of such as came through by licence to buy bushes, timber, bark, and coal, to sell again. Those who carried brush, bark, and coal upon their backs were to pay no chiminage, though it was for sale, except they took it within the king's demesnes (*b*).

The judicature of the forest. Part of this charter consisted of matters relating to the judicature of the forest. It was ordained, that persons dwelling out of the forest should not be obliged to appear before the justices of the forest, upon the common or general summons; but only when they were impleaded there, or were pledges for others who were attached for the forest (*c*). *Swainmotes* (which were the courts next below those of the justices of the forest) were to be held only three times in the year; that is, the first at fifteen days before *Michaelmas*, when the agistors came together to take agistment in the demesne woods; the second was to be about the feast of *St. Martin*, when the agistors were to receive pannage: and to these two swainmotes were to come the foresters, verderors, and agistors, and no others. The third swainmote was to be

(*a*) Ch. 11.(*b*) Ch. 14.(*c*) Ch. 2.

held fifteen days before St. *John Baptist*; and this was *pro fœnatione bestiarum*; to this were to come the verderors and foresters, and no other; and the attendance of such persons might be compelled by distress. It was moreover directed, that every forty days throughout the year, the foresters and verderors should meet to see the attachments of the forest *tam de viridi quàm de venatione*, as well for vert as vension, by the presentment of the same foresters.

Swainmotes were to be kept in those counties only where they had used to be held (a). Further, no constable, castellan, or other, was to hold plea of the forest, whether of vert or venison (which was a prohibition similar to, and founded on a like policy with one in *Magna Charta* about theft); but every forester in fee was to attach pleas of the forest, as well for vert as vension, and present them to the verderors of provinces; and after they had been inrolled and sealed with the seal of the verderors, they were to be presented to the chief forester, or, as he was afterwards called, the chief justice of the forest, when he came into those parts to hold the pleas of the forest, and were to be determined before him (b).

The punishments for breach of the forest law ^{Punishments.} were greatly mitigated. It was ordained, that no man should thenceforth lose either life or limb (c) *for hunting deer*; but if a man was convicted of taking venison, he was to make a grievous fine; and if he had nothing to pay, he was to be imprisoned a year and a day, and then discharged upon pledges; which if he could not find, he was to abjure the realm (d). Such were the tender mercies of the forest laws! Besides such qualifications of this rigorous system, it was ordained, that those who, between the time of Henry II. and this king's coronation, had been outlawed for the forest only, should be in the king's peace,

(a) Ch. 8.

(b) Ch. 16.

(c) *Pro venatione.*

(d) Ch. 10.

without any hinderance or danger, so as they found good pledges that they would not again trespass within the forest (a).

These were the regulations made by the Charter of the Forest; which concludes with a saving clause in favour of the liberties and free customs claimed by any one, as well within the forest as without, in warrens and other places, which they enjoyed before that time. To the whole is subjoined a like confirmation as that to *Magna Charta*, in the 25th year of Edward I.

Many copies of the Great Charter and Charter of the Forest were put under the great seal, and sent to the archbishops, bishops, and other dignified ecclesiastics, to be safely kept; one of which remained in Lambeth palace till a very late period (b). It is said, however, that Henry, when he came of age, cancelled, in a solemn manner, both those charters at a great council held at Oxford; and that he did this by the advice of Hubert de Burgh, chief justiciary, who, of all the temporal lords, was the first witness to both the charters. Notwithstanding this, we find in the 38th year of this reign, A. D. 1254, a solemn assembly was held in the great hall at Westminster, in the presence of the king; when the archbishop of Canterbury and the other bishops, apparelled in their pontificals, with tapers burning, denounced a sentence of ex-
Charters con-
firmed. communication against the breakers of the liberties of the church and of the realm, and particularly those contained in the Great Charter and Charter of the Forest; and not only against those who broke them, but also against those who made statutes contrary thereto, or who should *observe* them when made, or presume to pass any judgment against them; all which persons were to be considered as *ipso facto* excommunicated: and if any ignorantly offended therein, and, being admonished,

(a) Ch. 15.

(b) It is mentioned by bishop Burnet to have been among the papers of archbishop Laud.

did not reform within fifteen days, and make satisfaction to the ordinary, he was to be involved in that sentence (a). We shall see, in the succeeding reigns, how often these two charters were solemnly recognized and confirmed both by the king and parliament.

The first public act which presents itself in *Statutum Hiberniæ* the statute-book after the two charters, is *niæ*. the *statutum Hiberniæ de cohæredibus*, 14 Henry III. which, from a consideration of the matter and manner of it, has been pronounced not to be a statute (b). In the form of it, it appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point, where they entertained a doubt. It seems, the justices itinerant in that country had a doubt, when land descended to sisters, whether the younger sisters ought to hold of the eldest, and do homage to her for their several portions, or of the chief lord, and do homage to him; and certain knights had been sent over to know what the practice was in England in such a case. The following is stated as the usage of England at that time, agreeing with what is laid down both by Glanville and Bracton (c). If any one holding *in capite* died, leaving daughters co-heiresses, the king had always received homage of all the daughters, and every one of them held *in capite* of the king; and accordingly, if they were within age, the king had ward and marriage of every one. And again, if the deceased was tenant to any other lord, and the sisters were within age, the lord was to have the ward and marriage of every one; but with this difference, that the *eldest only* was to do homage for herself and her sisters; and when the younger sisters came of age, they were to do their service to the lord of the fee by the hands of their eldest sister: the eldest, however, was not on that account to exact of the younger homage, ward, or any other mark of subjection;

(a) Vid. Pickering's statutes.
vol. II. 99.

(b) Old. Abridg. Tit. Homage. Vid.

(c) Vid. ant. 89.

for they were all equal in consideration of law, and deemed as one heir only to the inheritance: and should the eldest have homage of her sisters, and demand wardship, the inheritance would be in a manner divided; so that the eldest sister would be *simul et semel* seignioress, and tenant of the inheritance, that is, heiress of her own part, and seignioress to her sisters; which could not well consist together; the law allowing no other distinction to the eldest sister but the chief mansion. Besides, if the eldest sister should receive homage of the younger, she would be seignioress to them all, and should have the ward of them and their heirs; which was always guarded against by the policy of the law, that never entrusted the person or estate of a minor to the custody of a near relation; which is the very reason given by Bracton (*a*) why the younger sisters should not be in ward to the eldest (*b*).

The other statutes made in this reign are the *provisiones*, or *statutum de Merton*, 20 Hen. III. and the statute *de anno bissextili*, 21 Hen. III. after which there appears none till the 51st year of this king.

Statute of Merton.

The statute of Merton contains eleven chapters, which are arranged with as little order as those of *Magna Charta*. The several alterations or confirmations of the law thereby made were as follow. We have just seen what provision had been made on the subject of ward and marriage by *Magna Charta*: To secure lords in this valuable casualty, it was now further ordained, that when heirs were forcibly led away, or detained by their parents or others, in order to marry them, every layman who should so marry an heir, should restore to the lord who was a loser thereby the value of the marriage; that his body should be taken and imprisoned till he had made such amends; and further, till he had satisfied the king for the trespass. This provision related to heirs within the age

(*a*) Bract. 88.

(*b*) The introduction of the English law into Ireland, and the progress it made there, may very properly become an object of consideration in another place.

of fourteen : as to those of fourteen, or above, and under full age, if such an heir married of his own accord without his lord's licence, to defraud him of his marriage, and his lord offered him reasonable and convenient marriage without disparagement ; it was ordained, that the lord should hold the land beyond the term of his age of twenty-one years, till he had received the double value of the marriage, according to the estimation of lawful men, or according to the value of any marriage that might have been *bonâ fide* offered, and proved of a certain value in the king's court.

Thus far the interest of lords was secured. The following provision was to protect infants against an abuse of this authority in their lords. If any lord married his ward to a villain or burghess where she would be disparaged, the ward being within the age of fourteen, and so not able to consent, then, upon the complaint of the friends, the lord was to lose the wardship till the heir came of age ; and the profit thereof was to be converted to the use of the heir, under the direction of her friends. But if the heir was fourteen years old and above, so as to be by law of capacity to consent to the marriage, then no penalty was to ensue (a). Again, if an heir, of whatever age, would not consent to marry at the request of his lord, he was not to be compelled ; but when he came of age, and before he received his land, he was to pay his lord as much as any would have given for the marriage ; and that, whether he would marry or not : for as the marriage of an heir within age was a lawful profit to the lord, he was not to be wholly deprived of it, but was to be recompensed in one way or other (b).

Some further provision was made respecting dower. It was provided by *Magna Charta*, that widows should give nothing for their dower : in order still further to secure to them a ready assignment of dower, it was now ordained, that persons convicted of deforcing widows of their dower,

(a) Ch. 6.

(b) Ch. 7.

should pay in damages the value of the dower, from the death of the husband up to the time of giving judgment for recovery thereof; and they were moreover to be *in misericordiâ* to the king (a). Because it had been doubted, whether, as a widow received her dower in the condition it was when her husband died, she should not leave it in like manner to the reversioner in the condition it was at her death; to remove this doubt, it was ordained, in favour of widows, that they might bequeath the crop upon their lands held in dower, as well as that upon their other lands (b).

Usury, which we have before seen (c) was treated with little lenity by our old law, was now put under a particular restraint. It was provided, that usury should not run against any person within age, from the death of his ancestor, whose heir he was, until he arrived at his full age: a provision which was dictated, no doubt, by the consideration that the profits of the infant's lands went to his guardian during the wardship, and that he was thereby disabled from paying the annual interest. This new regulation was to be without any prejudice to the principal and the interest which had accrued in the life-time of the ancestor (d).

Of commons. A provision made about commons of pasture was of great importance to lords of manors. When a lord, having great extent of waste ground within his manor, infeoffed any one of parcels of arable land, it was usual for the feoffee to have common in such wastes, as incident to his feoffment: and this was upon very good reasons: for as the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; the tenant used to have this allowance of common for his beasts of the plough as appendant to his tenancy; and from thence arose common appendant. Right of common, therefore, was founded upon the general interest of agriculture, and the particular one of the lord, whose land was thereby cultivated and improved.

(a) Ch. 1.

(b) Ch. 2.

(c) Ant. pa. 86.

(d) Ch. 5.

We have seen (a), that a remedy by assise had been devised to maintain tenants in possession of this right; but it seems, this remedy had been pushed too far, and began to encroach upon the demesne and original right of the lord; who, having suffered his tenants to range at large over his wastes for which he had not yet found any use, could hardly appropriate any part thereof without the imputation of encroachment on his tenants, and being liable to an assise of disseisin of common of pasture. To prevent such usurpations upon the lord, and adjust the reasonable claims both of lord and tenant, the following regulation was made: that when such feoffees brought an assise of novel disseisin for the common of pasture, and it was therein recognized before the justices, that they had as much pasture as was sufficient for their freeholds (b), and that they had free ingress and egress from their freehold to their pasture; then the person against whom the assise was brought should go quit for all the lands, wastes, woods, or pasture, which he had converted to his own use. But should it be alleged that they had not sufficient pasture, nor sufficient ingress or egress, the truth thereof was to be enquired of by the assise; and if it was found as alleged, then they were to recover their seisin by view of the jurors, and the disseisor was to be amerced, as in other cases (c).

The administration of justice was aided by a law concerning repeated disseisins, or, as they were afterwards called, *re-disseisins*. It was ordained, that when any person recovered seisin of his freehold, before the justices in eyre, by assise of novel disseisin, or by confession of the disseisors, and seisin had been delivered by the sheriff; if the same disseisors again disseised the same tenant of the same freehold, and were convicted thereof, they should forthwith be committed to prison, till they were discharged by the king upon payment of a fine. The way of bringing such contemners of the law to punishment is thus directed by the statute: When complaint was made at the king's court,

(a) Ant. p. 149.

(b) *Ad tenementa sua.*

(c) Chap. 4.

the parties injured were to have the king's writ directed to the sheriff, in which a relation was to be made *de disseisinâ factâ super disseisinam*, of a disseisin upon a disseisin; and the sheriff was to be thereby commanded, that he, taking with him the keepers of the pleas of the crown (a), and other lawful knights, should go to the place in question, and there, in their presence, by the first jurors and other neighbours and lawful men, make diligent inquisition of the matter: and if the party was convicted, he was to be dealt with as before mentioned; if not, the plaintiff was to be amerced. The sheriff was not to entertain such a plaint without the king's special command, namely, by writ. What is here said of lands recovered in assise of novel disseisin, extended to those recovered by assise of mortuancestor, or in any proceeding *per juratam* (b).

An alteration was made in the limitation of time for bringing certain writs. In a writ of right, as the law had been for some years, a descent might be conveyed *à tempore Henrici regis senioris*; but it was now ordained, that there should be no mention of so distant a time, but only *à tempore Henrici regis avi nostri*. Writs of mortuancestor, *de nativis*, and *de ingressu*, (a writ which had lately sprung up, and of which more will be said hereafter) were not to exceed *ultimum reditum domini regis Johannis patris nostri in Angliam*, king John's last return from Ireland into England; nor writs of novel disseisin, *primam transfretationem domini regis Henrici, qui nunc est, in Vasconiam* (c).

(a) Vid. ant. where these are supposed to be the coroners of the county.

(b) Ch. 3.

(c) Ch. 8.

Henry I. began his reign A. D. 1100. Henry II. A. D. 1154. King John went to Ireland in the 12th year of his reign, and returned the same year; between that and the 20th Henry III. were about 25 years. Henry III. went into Gascony for the first time in the 5th year of his reign; so that there were about fifteen years between that and the statute of Merton. [2 Inst. 94, 95.] Writs of mortuancestor before this act were *post primam coronationem Henrici II.* which was 20th October, 1154. Those of novel disseisin were *post ultimam transfretationem Regis in Normanniam*, which was in 1184, the 30th year of his reign. Vid. ant. 189.

Before another chapter of this statute is mentioned, it may be convenient to recollect, that there were two kinds of suits; suit *real*, as it was afterwards called, and suit *service*. Suit real was, in respect of residence, due to a leet, or tourn; suit service was, by reason of tenure of land, due to the county, hundred, wapentake, or manor whereunto a court baron was incident. Every one who held by suit service was required to appear in person, because the *suitors* were judges in those courts; and if he did not, he would be amerced; which was a heavy grievance; for it might happen that he had lands within divers of those seignories, and the courts might all be kept in one day; therefore, as he could attend personally only at one place, it was provided by this act, that every freeman who owed suit to the county, trithing (*a*), hundred, wapentake (*b*), or to the court of his lord, might freely make his attorney to do suit for him (*c*). This permission did not enable him to do the same at the leet, or tourn, because he could not be within two leets, or two tourns (*d*),

It is recorded in the statute of Merton, that the question about the legitimacy of children born before wedlock was still agitated between the clergy and common lawyers; the former maintaining their legitimacy, according to the constitution of pope Alexander; the latter alleging this to be contrary to the common law; as hath been mentioned before (*e*). The bishops now urged in council, that when the king's writ of bastardy was directed to them, to enquire whether a person born before wedlock was entitled to the inheritance, they neither could nor would give any answer thereto, because the question was put in a special way, and not in the form required by the church, which was general, whether bastard or not; and therefore, to make an end of the controversy, and the diffi-

Of special
bastardy.

(*a*) A district containing three hundreds.
a hundred.

(*c*) Ch. 10.

(*d*) 2. Inst. 99.

(*b*) Another name for
(*e*) Vid. ant. 85.

culty at once, they prayed the nobles to consent, that all such as were born before matrimony should, consistently with the law of the church, be deemed legitimate, and be intitled to succeed to the inheritance, equally with those born within wedlock (a). But the statute says, *omnes comites et barones unâ voce responderunt, quòd nolunt leges Angliæ mutari, quæ hucusque usitatæ sunt, et approbatæ* (b). This point of difference between the canon law and the law of the land did not rest here. In the same year, a solemn agreement was made between the king, bishops, and barons in council assembled, and by this the practice was settled, as will be shewn when we come to speak more particularly on the subject of bastardy. The nobles, who resisted the inclination of the ecclesiastics with such firmness, had no scruple to propose an innovation which had no object but to accommodate these potent landholders, at the expence of the liberty of the subject; but in this they were opposed by the king, who refused his consent: the proposal was, that they might imprison in a prison of their own all persons that were found trespassing in their parks and vivaries (c).

In the next year, there follows in the statute-book a public instrument which is intitled, the statute *de Anno Bissextili*, 21 Hen. III.; but which is, in truth, nothing more than a sort of a writ, or direction, to the justices of the bench, instructing them how the extraordinary day in the leap-year was to be reckoned, in cases where persons had a day to appear at the distance of a year, as on the *essoïn de malo lecti*, and the like. It was thereby directed, that the additional day should, together with that which

(a) This piece of canonical jurisprudence is actually adopted in the law of Scotland. They consider the subsequent marriage as having been entered into when the child was begotten; and therefore it is confined to the case of such women, whom the father, at that period, *might* have married. Ersk. Prin. b. 1. tit. 7. sect. 37.

(b) Ch. 9.

(c) Ch. 11.

went before, be reckoned only as one, and so of course within the preceding year.

After this, there are no statutes (except the confirmation of the charters 38 Hen. III. which has been mentioned already) till the fifty-first year of this king. During this interval of thirty years, great progress was made towards bringing the law to that state of consistency and learning to which it arrived in this reign; there is also the strongest proof (*a*) that the treatise of Bracton was written within this space of time; and that the account of the law given by that author, does not include the alterations made therein by the statutes passed in the 51st and 52d years of this king. It seems therefore the most natural order, to postpone the consideration of those statutes till we have taken a view of the previous state of the law; from whence we may proceed to the alterations made therein by those statutes.

This view of the law, as it stood towards the end of the present reign, will include in it not only a fuller account of what has been before delivered from the authority of Glanville, but likewise the numerous additions, variations, and improvements that had been made since his time. This will be extracted, as we promised, from that great ornament of our ancient jurisprudence, the treatise of Bracton, from which such parts will be selected as are thought best suited to the design of this History of our judicial polity. As the plan we here propose will lead us to reconsider all or most of the topics which were examined in the reign of Henry II. it will be very difficult to avoid the appearance of repetition. This will be guarded against as much as possible; and we trust that the reader will be satisfied that no subject is brought before him a second time, but where the nature of the enquiry and the progress of the History made it absolutely necessary.

(*a*) Vide post.

Ranks of persons.

We shall begin our short view of the law in this reign with some observations on the rights of persons. The ranks of freeman are stated by Bracton to be these; dukes, earls, barons, *magnates*, or vavasors, knights, and those who were plain freemen. Vavasors, he says, were persons *magnæ dignitatis*, and were so called *tanquam vas sortitum ad valetudinem* (a). The condition of *servi*, or *villani*, as they were commonly called, is more particularly described by this author than by Glanville, and the nature of that state may be tolerably well collected from his account of it (b). The *servus*, though he was generally considered as *in potestate domini*, and not *sui juris*; yet, as to life and limb, he was intitled to the protection of the law. The lord might take from his villain every thing he had, even his principal piece of property, which was usually his *waynagium*, or implements of husbandry; the rule being, that *quicquid per servum acquiritur, id dominio acquiritur* (c). These *servi* did not escape from their condition by going off the land of the lord, if they continued in the habit of returning; and sometimes they used to be permitted to absent themselves for a length of time from the lord's lands, and employ themselves in trade, upon paying to the lord a fine called *chevagium*, or chiefage, as an acknowledgment of their subjection and villenage. But if they left the lord's land without returning regularly, or ceased to pay their *chevagium*, they were then considered as fugitives; and when they were once become fugitive, they were to be pursued and demanded by the lord, both within liberties and without; for which purpose the aid of the king's officers might be had (d): and after such claim had been made, the *servus*, though he was not taken till after a year had elapsed, might be detained; but if no such claim had been made, then, at the end of a year, the *servus* would be privileged, and con-

(a) Bract. 5. b.

(b) Vid. Schmidt Geschichte, &c. vol. I. 596.

(c) Bract. 6.

(d) Ibid. 6. b.

sidered as free. So strictly was claim required to be made, that if the lord, after the lapse of three or four days only, without making any claim, had taken him any where *extra villenagium* (a), beyond the limits of his villenage, he would have been liable to an action for the imprisonment.

It seems, that villains in the king's demesnes were of different kinds. There were those who had been such before the Conquest, and who, in consequence of the polity then established, were permitted to hold their land in villenage (b), by villain and uncertain services, and who were to do every thing which their lords commanded them. But in the disorder of that revolution, many freemen were dispossessed of their lands by the lords to whom they were allotted, and were afterwards permitted to hold them in villenage, with the burthen of doing some villain offices, which however were certain and specified. These persons were, according to Bracton, sometimes called *gleba adscriptitii*, because, so long as they did the appointed services, they had the privilege *not to be removed* from the land; and were indeed freemen: for though they did villain services, yet it was not in their own personal right, but on account of their tenement, which was held in villenage, though, says Bracton, a sort of privileged villenage (c). "There was," says the same authority, "another holding in the king's demesne manors, which was by the same villain customs and services as the former, and yet was not villenage; nor were the tenants *servi*; nor did they derive their title from the Conquest, as the former did, but by covenant with their lords; so that some of them had charters, and some not; and these, if ejected, might recover seisin by assise, which none of the former could. Besides these, there were also tenures by soccage, and knight's service, in the

(a) *Extra villenagium*, that is, "out of his state of villenage," or beyond the lord's villain-territory.

(b) Vide ante, p. 29.

(c) Bract, 7.

“king’s demesnes.” These latter, says Bracton, were *ex novo feoffamento* (a) and *post Conquestum*; by which he seems to intimate his opinion as to the origin of the two principal tenures, those in soccage, and by knight-service (b).

A villain might also become free by manumission; which was a solemn and express act of declaring him free. There were other acts of the lord which were construed to amount to a declaration of a villain’s liberty, because they put him into a condition incompatible with a state of servitude. Thus, if a lord was to receive homage of his villain, or should, without any express manumission, give land to his villain, *habendum et tenendum liberè* to him and his heirs, though no homage was done, such gift was considered as an intimation that the donee should become a freeman. Nevertheless, if a gift was made to hold *per liberum servitium*, it was otherwise; there being, according to Bracton, a difference between holding *liberè* and *per liberum servitium*; for as a tenure in villenage would not make a freeman a villain, so a holding by free service would not make a villain free, unless it was preceded by homage (c).

Bracton speaks of two orders of villains: Of villenage. namely, those who held in *pure villenage*, and those who held in *villain soccage*. In the former, the service was uncertain and indeterminate; so that the villain, according to his expression, did not know in the evening what was to be done in the morning, but was to do every thing that was commanded him: in the latter, the service was certain; and yet the holding was not *liberum tenementum*, or freehold. Neither of these could alien their lands, as freeholders could; and if they did, it might be recovered at law (d): but the way in which a villain soccman was to make a transfer of his estate, was this: he was first to make a surrender of it to the lord, or, if he was not present him-

(a) But, see Madox Excheq. vol. I. 578. of old feoffment and new feoffment.

(b) Bract. 7. b.

(c) Ibid. 24. b.

(d) Ibid. 26.

self to his steward (*a*), and from his hands the conveyance was to be made to the purchaser; and this was considered as the gift of the lord, in whom, and not in the villain sockman, the freehold resided (*a*). Bracton does not say whether those who held in pure villenage had even the power of transferring their lands in this limited way; and it should seem, they had not yet obtained such privilege.

We are enabled to speak more particularly ^{Of free ser-} of tenures than we did in the reign of Henry ^{vices.} II.; they had now become more defined, were better understood, and treated with much more refinement. Tenure depended on the services reserved at the time of the feoffment; and therefore, to understand the nature and variety of tenures, it will be necessary to consider more particularly the clause of *reddendum*, by which the services were reserved in deeds of feoffment. When a donation was made by a private person, it was usual to express in the deed, with some precision, whatsoever was to be rendered to the donor in compensation for the thing given. Thus a gift was made sometimes *pro homagio et servitio*, for homage and service; sometimes for service only, without homage. If it was intended to create a knight's fee, the proper reservation would be *pro homagio et servitio*; but in the creation of a soccage-tenure, it would not be so proper; as fealty only, and not homage, was due for soccage-land: and indeed should homage have really been done, yet this would not intitle the chief lord to wardship and marriage; for ward and marriage did not so properly follow the homage, as the service, which in fact, and which alone, made a tenure, either military or soccage. Thus it often happened that homage was not required even in military tenures; as where one made a gift to his eldest son and heir, or a brother to a younger brother, such gifts were usually made without reserving homage, lest the donor should be ex-

(*a*) *Servienti.*

(*b*) Bract. 26.

cluded from succeeding to the inheritance by the rule, *nemo potest esse dominus et hæres*. For the same reason, gifts, when made to a younger son, used to be, *pro servitio tantum, tenendam de me totâ vitâ meâ sibi et hæredibus suis, et post mortem meam de capitalibus dominis pro servitio quod ad illam terram pertinet*. When the service was reserved in this way, the elder son might be heir to the younger, because there was no homage to constitute a *dominium*: if the gift had been *tenendam de capitalibus dominis*, it would have excluded him from the wardship also. In like manner, if a gift was made by the father to the eldest son, whether it was *pro servitio* or *pro homagio*, if it was to hold of the chief lord of the fee, and he died in the life of the father, the younger brother would succeed, and the father be excluded from the wardship; if he was a minor, the ward and marriage would belong to the chief lord, and if of full age, the relief likewise (a).

The reservation was sometimes *reddendo* so much *per annum* at certain times, or *faciendo* such and such services and customs, *pro omni servitio, consuetudine seculari, exactione, et demandâ*; by which all secular demands that belonged to the lord in right of the tenement were remitted. It must be observed of services and customs, that some belonged to the lord of the fee, and some to the king, corresponding with the distinction beforementioned between suit *service* and suit *real* (b). Of the latter kind, says Bracton, were *sectæ ad justitiam faciendam*, as in writs of right; *ad pacem*, to sit in judgment on a thief; and *pro aforciamiento curiæ*. To the donor of the land belonged such services as were due in recompence of the thing given, as rents, whether in gold or silver, in monies numbered; as if it ran *reddendo inde per annum decem aureos, argenteos*; or whether it consisted in fruits and profits of the ground, *reddendo inde per annum decem coros tritici*, four quarters of barley, four

(a) Bract. 34. b.

(b) Vid. ant. 265.

barrels of oil, or the like. Sometimes the reservation was made optionally; as, *reddendo inde per annum* so many gilt spurs, or sixpence, or a pound of pepper, or cumin, or wax, or a certain number of gloves; in which cases it (a) was at the option of the tenant which of them he would pay. Some services were to be performed to the lord of the fee, and consisted in doing some act at certain seasons: unless such services were specified, they would not be demandable; as where it was said, *et faciundo inde sectam ad curiam domini sui, et hæredum suorum, de quindenâ in quindenam, &c.* or, *faciundo inde* so many ploughings or reapings, and the like; all which belonged to the lord of the fee, and were due out of and in right of his farms and tenements, and therefore were not personal, but feudal or predial services.

A person might infeoff another to hold *by* Of serjeanty. *serjeanty*, which was of different kinds: some such services belonged to the lord who infeoffed; some to the king. Thus, for instance, when a person was to hold by the service of riding with his lord (b), or of holding the lord's pleas, or serving his writs within a certain district, or feeding his dogs or hounds, keeping his birds, finding him in bows and arrows, or carrying them, and innumerable like services; all these were called serjeanties. Services being divided into such as were called *forinsic* and such as were denominated *intrinsic*, all the abovementioned they considered in a particular manner as *intrinsic*, because they were of necessity to be expressed in the charter; and they were likewise reserved to the lord of the fee, and had not any reference to the king's army or the defence of the realm: in such tenure no ward or marriage accrued to the lord, any more than in soccage. These were usually called *petit serjeanty*, to distinguish them from such as

(a) Bract. 35.

(b) Which tenants, says Bracton, were usually called *Rod Knights*.

related to the king only. A serjeanty of this latter kind was (a), when a person was infeoffed by the service of finding one or more men to go with the king upon any military expedition with some kind of accoutrement; and from such a serjeanty, whether held of the king or a private person, there were due to the chief lord the ward and marriage of the heir (b).

It was before said, that the above services which were specified in the deed were called *intrinsic*. This term and its opposite were not wholly confined to express, that services were, or were not in the charter; for some other services, though expressly named in the charter of feoffment, were termed *forinsic*, because they belonged to the king, and not to the chief lord. These were performed without the tenant appearing in person, for he might satisfy the king, some way or other, for the service: they were due as accident or necessity made them requisite, and were called by various names. They were not only termed generally *forinsic*, as they belonged to the king, but had various other names of a more specific import. They were sometimes called *scutagium*, sometimes *servitium domini regis*; the meaning of which was this: they were called *forinsic*, because the service was done *foris* abroad, that is, *extra servitium* due to the chief lord; *scutagium*, because it related *ad scutum*, and the military service; *servitium regis*, because it belonged to the king, and not to the lord; and a feoffment by either of these latter appellations

(a) It might be expected that Bracton should call this latter *magna serjeantia*, to distinguish it from the other kind; but he does not. In another part of his book we are told by this author, that serjeanty was divided into *magna* and *parva*, with respect to its *value*, and as it should seem not with any distinction between a service performed to the king, and to a common person. This value appears not to have been very accurately defined. He says, that, according to some, it was a great serjeanty if valued at 100 shillings; and those, says he, might be called *petit serjeanty* that were worth half a mark. (87. b.) Whatever difference of opinion there was about the names, there seems to have been none about the consequence of the respective services, namely, in what cases ward and marriage was demandable by the lord, and in what not.

(b) Bract. 25. b.

was considered as the same thing: yet if a charter gave land *faciendo inde forinsecum servitium*, &c. the service, or the substitute for service, was to be expressed; as by the service of one knight's fee, or more; by the scutage of a hundred shillings; and the like (a).

There were other customs and dues which were neither intrinsic nor forinsic, but were rather, says Bracton, *concomitants* of services regal or military, and of homage. These were relief, marriage, and wardship, which need not be expressed in the charter; because if homage and regal service preceded, it followed that these belonged to the chief lord, whether it was a knight's service, or a serjeanty relating to the army. There were other customs and dues which, Bracton says, were not called services, nor the concomitants of services; as reasonable aid to make the eldest son a knight, or marrying his eldest daughter; which aids were *de gratiâ*, and not *de jure* (b), and were in consideration of the lord's necessities; for they were only to be demanded of his freemen in cases of necessity. These aids, too, were considered as personal, and not predial; for they respected the person, and not the fee, as may be collected from the terms of the king's writ which used to issue to the sheriff, commanding him, *quòd justè et sine dilatione habere faciat tali rationabile auxilium de militibus liberè tenentibus suis in ballivâ suâ*, &c. As these aids were not to be levied at the pleasure of the lord, respect was to be had, in assessing them, to the circumstances both of the tenant and lord, so as the lord might be relieved without oppressing the tenant; or, as Bracton says, *quòd auxilium accipienti cederet ad commodum, et danti ad honorem* (c).

A man might be infeoffed by divers kinds of services; as, by the service of one penny, and rendering scutage (that is, when demanded for particular occasions, as before-men-

(a) Bract. 35. b.

(b) Vid. ant. 127.

(c) Bract. 36. b.

tioned), and by one or more of the serjeanties above noticed. If the render was to be only in money, without any scutage, or serjeanty; or if two services were required optionally, as to give some certain thing *pro omni servitio*, or a certain sum of money; such a holding was called *soccage*: but though it was only for the payment of one farthing, if scutage and real service were added thereto, or if any serjeanty was reserved, it was considered as knight-service (*a*). The creation of all these tenures depended on the pleasure of the feoffor; for whatever might be the service he was bound to perform towards *his* feoffor, he might exact either more or less, upon making a feoffment to another. Thus a tenant by knight's service might infeoff another in soccage, or make a grant in villenage. Again, he might require knight's service, though he held only in soccage (*b*): and in such case, as well as in others, the tenant was protected against the chief lord by the warranty of the mesne, who stood between them.

The different kinds of tenure appear, from the above enquiry, to be these: some were by military service, since called knight's service, others by serjeanty; for which homage was to be done to the chief lord, because of the forinsic and regal service, and of that which related *ad scutum*, and the military calls for the defence of the country. Another was a holding *in soccagio libero*, in *free soccage*, where the service to the chief lord consisted in money, and nothing was due *ad scutum et servitium regis*: this was called soccage from *soccus*, a plough; because the tenants thereof were deputed, as it should seem, merely to be cultivators of the ground. In this tenure the ward and marriage belonged to the nearest relations; and though homage should *de facto* be done for such land, as it sometimes was, the chief lord was not on that account intitled to the ward and marriage, as those casualties did

(*a*) Bract. 37. b.

(*b*) Ibid. 36.

not always, though they usually did, follow homage. There was another kind of soccage, called *villain soccage*, where homage was never done, but only the oath of fealty was taken; the lord being interested to see that his villain did not, by any surprize, become his homager (a).

We are next to consider the circumstances ^{Homage and fealty.} of tenure, the principal of which were *homage*, *fealty*, and *relief*. Much stress was laid on homage, to which was ascribed greater efficacy than to any other part of this system, as it was the tie of feudal connection between lord and tenant. Homage is therefore defined by Bracton, to be that legal bond by which a lord is held and bound to warrant, defend, and quiet his tenant in his seisin against all mankind, for a service performed by him, as expressed in the deed of gift; and, on the other hand, that obligation by which a tenant was equally bound to preserve his faith towards his lord, and to do his proper service; which connection, as has been before shewn, is thus expressed by Glanville; *tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam* (b).

Homage was to be done at the time of the gift being made, either before or after seisin: if seisin was not delivered, the homage, says Bracton, had no effect (c). Homage was to be done several times by the same tenant to the same lord, if for different freeholds. It was due for all lands, tenements, and rents; and for every thing else which was held by any of the tenures before-mentioned (d). Homage was not due for a tenement that was held only for a term, (which included an estate for term of life) but *fealty* only. The person who was to do homage, says Bracton, was to seek his lord wherever he could be found; he was to approach him with reverence, and put both his hands between those of his lord: by which was meant to be signified on the part of the lord, protection, defence,

(a) Bract. 77. b. (b) Ibid. 78. b. (c) Ibid. 79. (d) Ibid. 79. b.

and warranty; on the part of the tenant, reverence and subjection; and he was to pronounce in that posture these words: *Devenio homo vester de tenemento quod de vobis teneo, et tenere debeo, et fidem vobis portabo de vitâ et membris et terreno honore, contra omnes gentes, salvâ fide debitâ domino regi, et hæredibus suis*; which agrees in substance with the form in Glanville's time (a). After this he was to take his oath of fealty, the form of which is not mentioned by Glanville, and is as follows: *Hoc audis, domine N. quòd FIDEM vobis portabo de vitâ et membris, corpore et catallis, et terreno honore: sic me Deus adjuvet, et hæc sancta Dei evangelia*. The difference between homage and fealty was this; that in the oath of fealty, which was the lesser obligation, the tenant engaged to bear his *faith* to his lord; in the other, he in addition thereto said, *Devenio vester HOMO*, that is, he became his *homager*.

Homage was not to be done in private, but in some public place, where every body had access; as in the county or hundred court, or in the court of the lord, in the presence of many persons, that the lord might have witnesses of the tenant being bound to him. Again, it was requisite that a diligent examination should be made at the time, whether the person doing homage was intitled to the land; as whether he was right heir to the person last seised; what was the kind and size of the freehold; whether he held it in demesne, or in service; or what part thereof in one or the other (b); all which was to prevent either the lord or the tenant being deceived. The effect of homage was such, that this caution seemed highly necessary; for when a person had done homage to one who turned out not to be his true lord, yet he could not recede from the obligation of homage, without the judgment of some court, so long as he held the land for which he did it.

(a) Vid. ant. 123.

(b) Bract. 80.

There were many ways in which the homage was dissolved : as, if either lord or tenant did any thing to the disherison of the other ; in the former case, the lord was to lose his *dominium* ; in the latter, the tenant was to lose his tenement. Again, should the lord die without heirs, the homage on his part was gone, but it revived in the person of the next superior lord, and still continued in the person of the tenant : the same, if the lord committed felony. In these cases, the superior lord could not waive the homage which was to commence between him and the inferior tenant ; for the tenant would then be deprived of his warranty. Besides, it might happen that by the feoffment the tenant was bound only to the service of a penny, while the superior lord was bound by the feoffment he had made to the mesne lord, to the warranty of a hundred librates of land ; and there is no doubt, but, in such case, a lord would gladly renounce his claim of homage, if the law would permit him. Nor would it avail the lord to say, that the tenant was not infeoffed by him, and that he claimed nothing in the homage ; for as there might be several superior lords, so there might be several tenants one below another ; and the chief lord of all held the lowest tenant bound to him by the ties of homage, because he was within his fee, though *per medium* ; and when that *medius*, or mesne lord was taken away for any cause whatsoever, the connection between the chief lord of all and the inferior tenant became immediate ; so that, one way or other, the inferior tenant was within the homage of the superior lord (a). To illustrate this by an instance : if I infeoff *A.* and *A.* infeoffs *B.* and *B.* infeoffs *C.* and so on ; then every tenant, from the first to the last, would be my tenants, and I their lord ; the only difference being, that the first would be immediate tenant, the others so *per medium*.

(a) Bract. 80. b.

We have been shewing how the obligation of homage might cease in the person of the lord, and remain in the person of the tenant. In like manner might the homage cease in the person of the tenant and continue in that of the lord: as where the tenant parted with the whole inheritance, and infeoffed another to hold of the chief lord, then the tenant was absolved from the homage; that is, the homage was wholly extinguished as to him, whether the lord consented or not, and commenced in the person of the alienee, who now was bound to the lord; and should the feoffee re-infeoff the feoffor to hold of the same chief lord, the homage of the tenant would thereby be revived. The homage would cease also when the tenant died without heirs, or committed any felony; in which cases the tenement *escheated* to the chief lord. The tie of homage and fealty was likewise dissolved, when the tenant disavowed the services by which he held, or denied that he held of the lord at all; in which case the lord had two remedies: he might either waive the forfeiture of the tenement, and proceed for the recovery of the services; or avail himself of the tenant's default, and demand the tenement by a writ of escheat, or (a) by a writ of right. Should the tenant do any atrocious injury to his lord, or side with his enemy, by giving advice or assistance against his lord (except it was with the king, or the superior lord of all, to whom he had done allegiance), or do any thing to the disherison of, or put violent hands on, his lord; all these were breaches of faith which dissolved the homage on the part of the tenant. It must be observed, that homage remained in force between lord and tenant as long as the heirs of both parties continued (which tenure was therefore, in after-times, called *homage auncestrell*); but upon the failure of any of them, the homage ceased, and could be revived in the persons of others only by some new

(a) Bract. 21.

cause. A tenant might decline holding his tenement, and so dissolve the homage: he might, says Bracton, also surrender the tenement and homage to the lord *propter capitales inimicitias*, and so dissolve the homage, that he might be at full liberty to prosecute an appeal against him.

It seems, that, in general, the lord could not *attorn*, as they called it, or transfer to another the homage and services of his tenant against his consent, particularly the homage; for by so doing he might subject him to a person who was his declared and inveterate enemy. A slight enmity, however, was not an objection, where the law allowed, as it did in some cases, such an attornment even against the tenant's consent. The most usual way of attorning the homage was, on a fine in the king's court, where the homager was to be summoned to shew cause why the homage should not be done to the other person; and if he could not shew sufficient reason to the contrary, it would be attorned without his concurrence (a). There were other instances, where homage might be attorned; as when land was given in marriage; when land was sold for redemption of the lord's person; in both which cases it might be attorned, unless any particular reason could be shewn to the contrary. This restraint upon the attornment of homage was founded on other reasons besides those beforementioned; as homage was the bond by which the tenant claimed the warranty and *excambium* of his lord, it was right that the lord should not have the power of transferring this obligation to another, who might be indigent, and not able to answer the warranty. This restriction was wholly in favour of the tenant, for whose benefit, indeed, homage seemed principally calculated; and if it was just that a lord should not be at liberty to decline the homage of the tenant, it was equally so that he should not attorn it without his assent.

(a) Bract. 81. b.

Although the law imposed this restraint as to homage, yet service might be attorned in all cases without requiring the assent of the tenant; and the person to whom it was attorned might distrain for it, without the tenant being able to make any resistance thereto (*a*). In such cases, some thought, that should the distress be for the homage and service both, it ought to cease as to the homage, though it held good as to the service; distress being incident to service, and belonging of course to the person who was entitled to the service. Yet a tenant was not to be oppressed by an attornment of service, any more than by an attornment of homage; it was adviseable therefore for the tenant, in order to secure himself from any unreasonable demands of his new lord, to get from him a charter, granting, that he would not demand more services than were due, and charging himself with a warranty and *ex-cambium*, in the same manner as the first lord was bound.

If the lord refused to receive the homage, the tenant had several remedies. In the first place, the service, which the tenant was not bound to without homage, was lost to the lord; and should homage be forced upon the lord by a judgment of court, the arrears of service were still lost. If the homage was refused publicly by the lord, the tenant might attorn himself to the next superior lord; and if he refused, to the next; and so on to the king, who was the chief lord of all; and if they all refused, the tenant was quit of all demands for service. But should any of them accept it, the immediate lord, who had refused it, could never recover the homage or service; though he would, on account of his wilful refusal, be still bound to warranty, notwithstanding the person to whom the tenant did homage had the service (*b*).

When a mesne lord had accepted the homage and fealty of his tenant, and received the service, but had applied it

(*a*) Bract. 82.

(*b*) Ibid. 82. b.

to his own use without acquitting him from the demands of the superior, and this was proved in the presence of good and lawful men; he might, in future, without any breach of law, satisfy the chief lord with his own hands, by doing his service to him; and yet the mesne lord would not, on that account, be discharged from his warranty (a). The remedy against the mesne lord, in such cases, was by a writ *de medio*.

After homage was performed, the next thing for the heir to do, was to pay the relief; so Relief. called, says Bracton, because thereby the tenement and inheritance which was in the hands of the ancestor, *et quæ JACENS fuit per ejus decessum, RELEVATUR in manus hæredis*. The sums to be given on these occasions were settled by *Magna Charta* (b), except in tenure by serjeanty, which was still left to the discretion of the lord (c). A relief was to be paid only in cases of succession, and never upon a change of tenant by buying or selling, or any other sort of purchase (d). It was to be paid to the next immediate lord, and no other: it was to be paid only once, and not upon the change of the lord; for though homage might be done several times, relief was to be paid only once (e); so that the doubts expressed by Glanville on this head no longer existed (f). Another gift was to be made to a lord by the heir when he succeeded his ancestor, which was called a *heriot*. This was, however, in nothing like a relief; for it was given by all tenants, as well villain as free, and it rather came from the deceased than the heir: it was, says Bracton, when a man remembered his lord by the best beast, or second best beast he died possessed of, according to the custom of different places, and was rather *de gratiâ* than *de jure*; and, in fact, it related not at all to the inheritance (g).

(a) Bract. 84. (b) Vid. ant. 235. (c) Bract. 84. (d) Vid. ant. 125, 126. (e) Bract. 84. b. (f) Vid. ant. 125. (g) Bract. 86.

Of wardship
and marriage.

The subject of ward and marriage is treated by Glanville, and by Bracton, principally in the same way, and sometimes in the same words; we shall therefore touch upon such parts only as are stated somewhat differently, or are discoursed upon more at large by Bracton.

The age of female wards was contended by some to be at fifteen years complete, both in military and soccage tenure; for, as to the former, they said, that she might have a husband who was equal to perform the military service(*a*); and therefore she might, with propriety, be reckoned of age before she was twenty-one years of age. But this opinion is combated by Bracton, who says, that the same principle might make her of age at an earlier period; and he therefore lays it down, that there is no distinction between male and female wards, in the respective tenures; and that it was only in the latter that females, (as we have before shewn of males) were to be considered as of age at fifteen years; at which time, says Bracton, a woman is able to manage her domestic concerns (*b*); which is a similar description to that given by Glanville (*c*), and adopted by Bracton, of the qualifications of an heir in burgage-tenure: and the latter author mentions fifteen as the proper age for the infancy of a tenant in soccage to cease, because he was then able to attend to affairs of agriculture.

It is laid down positively by Glanville, that if a person married his daughter and heiress without the assent of his lord, he should forfeit his inheritance; and that a widow who married without her lord's assent, should in like manner forfeit her dower (*d*). These two points are recognis-

(*a*) Bracton says, another reason was given in favour of this early liberation from pupillage: *Fœmina magis doli capax est quàm masculus, et maturiora sunt vota mulieris quàm viri.*

(*b*) To this Bracton adds, that she might *habere COLNE et KEYE*; which is thus explained by Spelman: *COLNE Saxonice est CALCULUS; KEYE, CLAVIS; quasi eò spectaret hic locus, ut fœmina congruè ætatis haberetur, si COMPUTUM et CLAVES domesticas valeret curare.* Spelman, voce. Bract, 26, b.

(*c*) Vid. ant. 114.

(*d*) Vid. ant. 116, 117.

ed by Bracton as remnants of the old law, which had gone out of use. We have before seen what notice was taken of this cruel piece of law by *Magna Charta*; and it was now laid down by Bracton, that in both cases the lord was only intitled to a penalty; the measure of which, however, he does not mention (*a*).

When an infant succeeded to inheritances that were held of different lords, the custody of the lands belonged to the respective lords of whom they were held; but the custody of the heir's person, and the marriage, which was the great source of emolument to the lord, could belong to one only; and there was some difficulty in ascertaining who that person should be. It is laid down generally by Glanville, that this should be the chief lord of whom the heir held his first fee (*b*); and that the king, by his prerogative, was intitled to certain preferences. The manner in which both these claims were adjusted is more fully explained by Bracton.

As an exception to the prerogative, which gave to the king the custody of the heir and his lands of whomsoever they were held by knight-service, it is laid down, that if any held of the king *per fædi firmam*, or in soccage, or in burgage, or by *serjeanty*, to perform the service of finding him knives, or darts, or the like, the king should not have custody either of the heir, or of the lands he held of any one else; nor if he held of the king as of an honor or escheat; it being provided by *Magna Charta* (*c*), that the tenure in such case should remain the same as it was when in the hands of the former possessor; though, even in case of escheats, if the heir held under a new grant from the king, the king's prerogative to wardship would prevail. This prerogative of the king, therefore, prevailed in respect only of a tenant who held of him *in capite* by military tenure, or by *serjeanty* to attend the king's person; and it only ex-

(*a*) Bract. 88.

(*b*) Vid. ant. 115.

(*c*) Vid. ant. 238.

tended to subject lands held by military tenure to the ward of the crown (*a*).

In soccage-tenure the wardship belonged to the next of kin, and not to the lord; and therefore, in general, if an heir had inheritances held in soccage of different lords, there could arise no question about priority of feoffment, to ascertain the right of wardship, as in military tenures; though it is said by Bracton, that by special custom in some places, and amongst others in the bishopric of Winchester, the lord had the wardship in soccage tenure, and in such cases, recourse must of necessity be had to priority to determine who was chief lord; yet this preference was only against lords whose tenures lay within the reach of the custom, and not against other persons (*b*).

The first fee, in many cases, which constituted a person chief lord, and gave him the priority, was the fee that was first *delivered* to the heir. The lord was not to receive homage, before he had *delivered* the inheritance to the heir: the wardship and marriage could not be demanded from the infant heir, any more than relief, or any service could from the heir of full age, before homage; the delivery, therefore, of the inheritance was the first step towards acquiring a right to the wardship and marriage, and the receiving of homage completed the claim. It follows from hence, that as long as the homage of the ancestor had continuance, no delivery was to be made of the inheritance, and that homage continued during the ancestor's life, unless he had made any transfer of the land which broke the homage. Every transfer had not that effect. Thus, if a person holding by military service and homage, granted the land to his son and heir for life, to hold either of himself or of the chief lord, the homage still continued between the father and the chief lord; but it would

(*a*) Bract. 87. b.

(*b*) Ibid. 88.

have been broken, if the father had parted with the whole inheritance.

The ceasing of the homage and the delivery of the inheritance will be better understood by considering the following cases. Suppose *A.* having an inheritance, married *B.* having one also; both held of the same lord. They have a son. *A.* dies, leaving his wife *B.* alive: the inheritance of *A.* might be delivered to the heir by the lord, who would, in consequence, be entitled to homage, ward and marriage. But if *B.* the wife had died, leaving *A.* alive, it would be otherwise; because the homage done by *A.* in the name of his wife still continued; for it could not be dissolved during his life, as he was intitled to hold the land *per legem Angliæ*: the heir of *A.* therefore continued in the power of the father, during whose life he owed no homage to the lord; as two homages could not be done for the same land. And so it was, wherever the heir was descended both from the husband and wife; but it was otherwise, where there was a second marriage, and he was descended only from one. As for instance, if the wife only had an inheritance, and the husband died first, leaving an heir, the inheritance could not be delivered during the life of the wife; and of course the lord would not have wardship and marriage: so if she married one or more husbands, there was still to be no delivery; and, of course, no ward or marriage, as long as she or any of her husbands lived: the same, if the wife died, leaving any husband alive: but as soon as the surviving husband died, then the inheritance might be delivered to the heir of the deceased wife by her first husband, and ward and marriage would follow.

Thus, as the preference depended upon the delivery of the inheritance, and that upon the death of the person in seisin, it might happen that the death of the husband and wife might fall so near as to leave a difficulty in determining which died first. It such case they used to recur, as

in Glanville's time, to the first feoffment, and disregard the priority of delivery ; and so they did, when the inheritance on the part of the father and that on the part of the mother were held of different lords, and were united in the person of one heir (*a*).

The guardian in soccage had the marriage of the heir and all other casualties and profits of wardship the same as the guardian in military tenure ; and what is very remarkable, the right of the guardian in soccage was so much considered, that the law allowed the *apparent* next of kin to take, notwithstanding he was a bastard and illegitimate (*b*). This made a guardianship in soccage as great an object as that in military tenure ; and the struggle for the marriage of the heir did not lie only between the different lords of whom he held in military tenure, but, if he also held any soccage lands, there might be a contest between the lord in military tenure, and the person who was intitled to be guardian in soccage. When, therefore, land in military tenure descended from the father, and land in soccage from the mother, or *vice versâ*, and they both centered in the same heir, the marriage of the heir was decided, says Bracton, by priority, in the manner before-mentioned (*c*). But if lands in soccage and in military tenure descended from the same ancestor ; then, notwithstanding the soccage might be of the prior feoffment, yet the privilege of military tenure prevailed, and the lord of those lands would exclude the next of kin, and have the ward and marriage (*d*).

Thus was the person of the infant heir made a property of either by his guardian in chivalry or in soccage : the disposal of the heir in marriage might be sold to the best purchaser, like the fruits and profits of his lands. We shall soon see (*e*), that the legislature made some provision against this oppression, in the case of guardians in soccage ; but the others were rather secured in their rights by another

(*a*) Bract. 89. b.

(*b*) Ibid. 88.

(*c*) Ibid. 88. b.

(*d*) Ibid. 91.

(*e*) Stat. Marl.

provision of this reign, which made void all conveyances of the inheritance to the heir in the life of the ancestor; a practice by which tenants in chivalry endeavoured to avoid the claim of ward and marriage (a).

Having considered the terms and conditions ^{Of gifts of land :} on which landed property might be held, the next object which naturally presents itself, is, the manner of acquiring a title to property : and this was of three kinds; by *gift*, by *succession*, and by *will*. We shall consider these three in their order, beginning with the first (b). A gift of land might be considered in various ways; either as, what is called by Bracton, *libera et pura donatio*, or that which was *sub conditione*; and, in another respect, such as was *absoluta et larga*, or that which was *stricta et coarctata* to certain particular heirs, with an exclusion of others. These will be treated of more minutely hereafter; when we have first enquired what persons were capable of making gifts of land, and what not.

The person who was regularly and properly ^{By whom :} intitled to make a gift of his land, was he who was seised in fee; but yet some others who had an inferior interest, could, to a certain degree, make a gift; as any one who had a freehold, though only for life; and even such as had no freehold; as one who had a term for years, or the wardship of land: and indeed those who had no lawful title; as one who was in seisin by intrusion or by disseisin, might, says Bracton, convey a freehold, though it was not a complete and indefeasible one. A gift made by a minor, or a madman, would be good, if confirmed after the one was of age, and the other had become of sane memory (c). Those who could not make a gift, were such as had not a general and free disposal of their property: such was the condition of minors, who were *sub tutelâ vel curâ*; yet these could accept a gift with consent of their tutor,

(a) Vid. post. Stat. Marl.

(b) Bract. 10. b.

(c) Ibid. 11. b.

as the law allowed them to meliorate their condition, though not to lessen it by making a gift, even with consent of their tutor: the same of a person deaf and dumb; a person taken prisoner by an enemy, while in the enemy's custody; or a leper removed from the converse of mankind. Others were incapacitated *sub modo*. Thus archbishops, bishops, abbots and priors, could not make gifts without the assent of the chapter; nor the chapter without the assent of the king, or other patron, whoever he might be; the concurrence of all, whose interest was concerned, being absolutely requisite. Rectors of churches, as they possessed nothing but in the name of their churches, could make no alienation thereof but by consent of the bishop or patron. (a); nor even make any change therein for the better (b). Bracton lays it down, that a bastard could not give his land unless he had heirs of his body, or he had made lawful assigns thereof, conformably with the terms of the donation. This restriction on the alienation of a bastard seems to have been imposed in favour of the lord, who, as the law now stood (though it was otherwise in Glanville's time), would, on failure of heirs, succeed by escheat. For a similar reason no one charged with felony could alien his land with effect, though the gift would hold *till* he was convicted, and if he was acquitted would be valid. All gifts between a husband and wife were void (c); nor could a husband give his land to another, to be conveyed by the donee to his wife in his life-time, or after his death, as that would be a fraud upon the letter of the law.

Thus far of the persons who might make a gift
 To whom. of land; next of those *to whom* a gift may be made. A gift, as has been before said, might be made to a minor; and in such a case, a *tutor*, or *curator*, used to be appointed to accept and take care of such gift; but the law

(a) So Bracton reads. Quere, if it should not be *and*? (b) Bract. 12.

(c) Vid. ant. 91. 111.

did not allow the feoffor to appoint such tutor (a); for that, says Bracton, would seem like a continuance of the seisin, instead of making a feoffment of it. A gift might be made to a Jew, unless the original charter had a clause which forbid such an alienation; it being very common in those days to add to the clause of assignment *exceptis viris religiosis, et Judæis*: it seems, that Jews were not by law incapacitated from taking gifts of land, except in these particular cases (b). If a gift was made by a man to his wife and his children, or her children begotten of another husband, the gift, though void as to the wife, would hold as to the others.

It has before been said, that a person might give what he had in fee, for life, or for years; to which may be added, that he had this power, whether he was seised to himself solely, or in common with another. He might also give that which he had in expectancy after the death of his ancestor, who held it in fee. He might give what he had granted before to another for a term of years, with a saving to the farmer of his term; because these two possessions could very well consist with each other, so as one should have the freehold, and the other the term.

It has before been shewn, that these gifts might be of greater or less extent and duration; they might be in fee, for life, in fee farm, for term of life, or for term of years. Where a gift was for life, whatever the circumstances might be, the donee had immediately *liberum tenementum*, or, as it has since been called, *a freehold interest*, so as to have an assise, if he was ejected; and such a donee might, as has before been said, make an imperfect donation in fee, or for life; so great consideration did the law bestow on a freehold of any sort (c).

(a) Bract. 12. b. It is to be regretted that Bracton has not informed us by whom he was to be appointed.

These terms of *Tutor* and *Curator* are borrowed from the civil law, and the appointment of them to protect property given to an infant is adopted from the same source. Inst. lib. 1. tit. 13. et sequent.

(b) Bract. 13.

(c) Ibid. 13. b.

To ascertain that gifts were actually made by the parties whose names were to the deed of gift, and that they were in a capacity to manage their affairs, a writ was framed requiring the sheriff to make inquisition whether the donor was *compos sui*; which writ was either to be executed before the sheriff, and guardians of the pleas of the crown, or before the justices at Westminster (a). There was another writ, to enquire if it was the donor's seal, or was really affixed to the charter by him; and if, upon enquiry, any one was charged with a fraud respecting the gift, he was summoned to answer for it (b). All gifts should be free, and without compulsion; and therefore, should it be proved that any coercion was used with the donor, the gift was revoked; but if the donor dissembled the force, and did not complain of it till some length of time, he would not be permitted afterwards to invalidate the gift by such a suggestion. If it was in time of war, he was to make a declaration thereof as soon as peace was restored; if in time of peace, then, says Bracton, as soon as he had escaped from the duress, he was to raise a hue and cry after the parties; and in either of these cases, he would be considered by the law as having done all in his power (c).

Of simple gifts. Having premised these observations concerning the capacity of persons to become donors and donees; the next subject is the donation itself. It has been said that donations were, some of them, simple and pure; that is, where no condition or modification was annexed. The following is a pure and simple gift of land, and, as it was the common form of gifts or feoffments at this time, is very well worthy of notice: *Do tali tantam terram in villâ tali, pro homagio et servitio suo, habendam et tenendam eidem tali et hæredibus suis de me, et hæredibus meis tantum, ad tales terminos, pro omni servitio, et consuetudine seculari, et demandâ; et ego et hæredes mei warrantizabimus, acquietabimus, et defendemus in perpetuum*

(a) Bract. 14. b. (b) Ibid. 15. (c) Ibid. 16. b.

prædictum talem, et hæredes suos, versus omnes gentes per prædictum servitium, &c. A gift like this, *tali et hæredibus suis*, was to be understood in the large sense of the term *hæres*, and as comprehending all heirs, both near and remote (a). Another way of enlarging this clause was, *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit*, with a clause of warranty co-extensive with such a donation. In such case, if the donee assigned and died without heirs, the donor was bound to warrant the assignee; which could not be without such an express engagement in the deed of gift; so that the express mention of assignees seemed necessary to give a complete power of alienation.

As a gift might be made largely, so it might, as before stated, be *coarctata*, and confined to particular heirs; as, *tenendam sibi, et hæredibus suis QUOS DE CARNE SUA ET UXORE SIBI DESPONSATA PROCREATOS HABUERIT*; or, *tali et uxori suæ, or cum tali filiâ meâ, &c. tenendam sibi et hæredibus suis de carne talis uxoris, or filiæ exeuntibus, &c.* In these cases the inheritance descended to the particular heirs there specified, to the exclusion of all others. If a person so infeoffed should infeoff any other, the heirs would be bound to warranty; for though some had endeavoured to maintain that they took together with their ancestor, yet Bracton denies it, and says, they only took by descent. And should the person so infeoffed have no such heirs, or they should fail, the land would revert to the donor by a tacit condition, without any mention thereof in the gift.

The construction of law upon the estate and interest of such donees was, that, in the first of the above cases, should there be no heir, the land given would be a freehold in the donee, but not a fee; in the second, it would be a freehold till heirs were born, and then it would become a fee; and when they failed, it would again become only a freehold.

(a) Bract. 17.

Thus, we see, it was at the pleasure of the donor, at the creation of the gift, to modify it as he pleased, however contrary to the general disposition the law would make thereof; in which instances the maxim, that *conventio vincit legem*, was the principle which governed: and this was not only in prescribing what heirs should inherit, but also in the service to be performed; which, as has been seen before, was in the breast of the feoffor to order as he liked, so as he warranted his tenant against the chief lords (a).

Of conditional gifts. We have hitherto spoken of the heirs that were pointed out by the will of the donor to succeed to the inheritance. We shall next take notice of the conditions and modifications under which the inheritance was to be enjoyed; and these imported sometimes a burthen, sometimes a benefit, to the donee, and were of different kinds. Thus a gift might be, *tenendum sibi et hæredibus suis, si hæredes habuerit de corpore suo procreatos*: where, if the donee had heirs of his body, though they afterwards failed, yet he had satisfied the condition, and all his heirs, without distinction, became entitled to inherit: but if no such heir had been born, the land given would have been only a freehold, and would return to the donor, to the exclusion of the heirs general, because the condition had not been fulfilled. If a gift was *viro et uxori, et hæredibus uxoris*; or, *viro et uxori, et hæredibus viri*; or, *viro et uxori et hæredibus communibus, si tales extiterint, vel si NON extiterint, tunc ejus hæredibus qui alium supervixerit*; these were all *sub modo*. Others were *sub modo*, and also *adjectâ conditione*; as, *Do tali tantam terram, ut det mihi tantum*; or, *ut mihi inveniat necessaria*. These gifts, though not wholly gratuitous, yet, Bracton says, were *simplex et pura*; and if livery was given thereon, they could not be revoked, though the condition was not performed, unless there had

(a) Bract. 17. b.

been an express covenant entitling the donor to enter for breach of the condition (a).

The limitation of estates went much further than what has yet been stated. A person would make a gift to his eldest son *A. tenendum sibi et hæredibus suis de corpore suo procreatis*; and if he had no such heirs, or they should fail, then to his second son *B.* to whom he directed it to revert, to have and to hold to him in the same manner; and upon like failure to *C.* his third son, in the like way; and so on: and if the said *A. B.* and *C.* all died without such heirs, the land to revert to the donor and his heirs; which last was unnecessary, as the law would, of course, give the reverter to him. Other gifts were as large as the former was confined; as, *tenendum tibi et hæredibus tuis, vel cui dare, vel assignare in vitâ, vel in morte legare volucris*. A regard to the will of the donor induced them to support such gifts; for Bracton lays it down, that if the legatee got the seisin, and an assise was brought against him by the heir, he might plead the form of the gift, and it would be a bar (b): so that the restraint upon gifts of land by will, which seemed one of the strictest points in the law of landed property, might be dispensed with by the special form of the original gift.

Innumerable were the conditions upon which gifts might be made. Some of these were conditions precedent, and some subsequent, to the vesting of the estate given: some of them were supported by law, and some not; and various were the reasons given why they should not be supported. A few instances of this kind will serve; as, *Do tibi talem terram, si Titius voluerit; si navis venerit ex Asiâ; si Titius venerit ex Jerusalem; si mihi decem aureos dederis; si cælum digito tetigeris*; and the like (c); some of which were accompanied with an express condition of reverter on failure in performing the terms on which the gift was made, and some not.

(a) Bract. 18. a. b.

(b) Ibid. 18. b.

(c) Ibid. 19.

The course of descent was entirely under the controul of the donor in making the gift. A gift was sometimes made to a person for a term of years, and after that term to revert to the donor; with an agreement that if the donor died within the term, the land should remain to the donee for life, or in fee, as it might happen. Thus a freehold and fee might be raised by a condition; and in the same manner might be changed into a term; for when a gift was made for life, it might be added as a condition, that, should the tenant die within a certain time (*a*), his heirs, tenants, assigns, or executors, should retain the land for a certain term after his death. When land was given to a creditor *in vadium*, it was sometimes agreed, that if the money was not paid at an appointed day, he should hold it to him and his heirs. Gifts were often made for a term of years, yet so as to be restored to the donor, if he ever returned into the kingdom; but if he died in his voyage, or did not return, to remain to the termor in fee; upon the performance of which condition the term ceased, and the fee commenced (*b*).

In all gifts *in maritagium*, or to a *bastard*, there was an express or tacit condition of reverter. If land was given to a bastard in marriage with a woman, it was always either to them *et hæredibus eorum communibus*, or, *hæredibus ipsius uxoris tantum*. In the former case, there was, by a tacit condition in the gift, a reverter to the donor, upon failure of common heirs: in the latter, if she had heirs by the bastard, the land went to them: if she had none, it descended to other heirs of the wife, whether born of another husband, or collateral. Suppose land was given to a bastard solely, without his wife, *ei et hæredibus suis*, or *ei et assignatis suis*; in the former case, upon failure of heirs, whether homage had been done or not, the land, contrary to the usage in Glanville's time (*c*), escheated for want of

(*a*) Bract. 19. b.(*b*) Ibid. 20.(*c*) Vid. ant. 119.

heirs; in the latter, if he had made an alienation, it was good, though there was a failure of heirs (*a*). If a bastard had a brother, that brother could not take from him by descent.

Land was sometimes given before the espousals by some relation of the wife to the husband with his wife, or to both of them; as, *tali viro et uxori suæ, et eorum hæredibus*, or *alicui mulieri ad se maritandum*, or simply, without any mention of marriage; but if there was mention of marriage, then the land so given was called *maritagium*. A *maritagium* used to be given either before, or at the time of, or after, the matrimonial contract. *Maritagium* was, as has been said before (*b*), of two kinds: it was *free*, or *not free*; the particulars of which distinction were now more minutely set forth, than in the time of Glanville. *Liberum maritagium* was, where the donor was willing that the land should be quit and free from all secular service (*c*) belonging to the lord of the fee, so as to perform no service down to the third heir inclusive, and the fourth degree. The degrees were computed in this way: the donee made the first, his heir the second, his heir the third, and the heir of the second heir the fourth. The heirs were computed thus: the son or daughter of the donee was the first, the son or daughter of them the second, and their son or daughter the third; which third heir was to do homage and perform the service. As there was a reverter to the donor, on failure of heirs, there was to be no homage in these gifts; but should those in the right line fail, the land would go to the remoter heirs, if the form of the gift allowed it (*d*).

These gifts were made in different ways. If land was given *tali filie meæ ad se maritandum*, without mention of heirs, this conveyed only a freehold, and not a fee; and therefore, after the death of the wife, it reverted to the donor; nor had the husband any claim upon it *per legem*

(*a*) Bract. 20. b. Vid. ant. 290. (*b*) Vid. ant. 121. (*c*) Bract. 21.

(*d*) Ibid. 21. b.

Angliæ (a). If it was *ad se maritandam, et tenendam sibi et hæredibus suis*, generally; then, though she had no heirs of her body, the remoter would be called in, and the husband would possess it *per legem Angliæ*. If it was confined to particular heirs, it reverted on failure of such heirs. Thus, if it was to the common heirs of the husband and wife, and they had a daughter, and the husband died, and the widow married again and had a son, the daughter would be preferred to the son; though it would be otherwise, had the gift been to the wife only, and the heirs of her body (b).

Estates by
courtesy. The right of a husband to retain the land of his deceased wife *per legem Angliæ*, is defined by Glanville and Bracton in the same manner, except that the former (c) states it as if confined to estates given with the woman *in maritagium*: if so, this claim had now extended itself; for Bracton says, the husband should have the land if he married a woman *habentem hæreditatem, vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land (d). He agrees likewise with Glanville, that the second husband was equally intitled with the first. It seems, one *Stephanus de Segrave*, whose name we find among the justices itinerant in this reign, had written a treatise, in which he had combated this opinion, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage.

The crying of the child, which was a necessary circumstance towards establishing a title to this estate, was to be proved *per sectam sufficientem*, consisting of persons who heard, with their own ears, the cry; and not by those who had it by hearsay. The cry was only an evidence of the child being born alive; but this evidence was more re-

(a) Bract. 22. b. (b) Id. ibid. (c) Vid. ant. 122. (d) Bract. 437. b.

garded than any testimony of midwives or nurses, who might be induced, by various motives, to give false testimony; and no proof of the child being born alive, and christened as such, would be received in lieu thereof. So rigid were the lawyers of those days in exacting this only proof of life, that where the child was born deaf and dumb, they pronounced, *tamen clamorem emittere DEBET, sive masculus sive fœmina*; which expectation had been thrown by the lawyers of those days into a singular monkish verse (a). If the child was a monster, and, instead of a *clamor*, uttered a *rugitus*, as Bracton expresses it, it would not satisfy the requisite of the law, much less would a birth that was supposititious (b).

The tenant *per legem Angliæ* was to have all incidents that happened, whether in services, wards, reliefs, or the like, during his life; but if any land, or inheritance, fell in after the death of the wife, such accession went to the heir, if of age; if not, to the chief lord who had custody of him; as likewise did the wards and the like; it being a rule, that the husband should retain nothing that did not accrue in the life-time of the wife.

Among other impediments to the husband claiming this estate, Bracton reckons that of having *machinatus in mortem uxoris*; and this, he says, would be a good plea to bar him of his right. If no heir was born of the marriage, and the husband held possession by force, after the death of the wife, the next heir might have the following writ, which is recorded to have been framed for one *Ranulphus de Dadescomb* by *W. de Ralegh*, a name often found among the justices of this period. *Rex vicecomiti salutem. Ostendit nobis A. quòd cum B. et C. uxor ejus tenuissent tantam terram, &c. ut jus, et hæreditatem ipsius C. quæ nuper obiit sine hærede de corpore suo procreato (ut dicitur), unde terra illa descendere debuit ad prædic-*

(a) The verse is as follows:

Nam dicunt e vel a quotquot nascuntur ab Evâ.

(b) Bract. 438.

tum A. sicut ad propinquiorem hæredem ipsius C. quia prædicta C. sine hærede de corpore suo procreato decessit; idem B. post mortem prædictæ C. uxoris suæ contra legem et consuetudinem regni nostri cum vi suâ se tenet in eâdem, ita quòd prædictus A. in prædictam terram, ut in jus et hæreditatem suam, ingressum habere non potest. Et ideo tibi præcipimus, quòd si prædictus A. fecerit te, &c. tunc summoneas, &c. prædictum B. quòd sit coram justitiariis, &c. ostensurus quare deforceat eidem A. prædictam terram, et habeas ibi, &c. (a) which seems to be the most simple form of a writ of entry; a species of writs which had lately grown into vogue, and of which more will be said in the proper place.

Having said thus much of estates which reverted to the donor upon a condition expressed or implied, it may be requisite to consider the effect and consequence of such a reverter or reversion. The reversioner, says *Of reversions.* Bracton, was considered neither *pro hærede* nor *loco hæredis*; nor was he bound to warrant any thing done by the donee, except the appointment of dower; and this only where the donation was pure, without any condition or modification whatever. Land reverted not only for a failure of heirs or assigns, but in case of felony committed by the tenant, which threw a perpetual impediment in the way of descent; in which instance, it might happen that the donor had made a reservation of the services to himself, which made him lord, and then he took it as an escheat. In such case, he was deemed *in loco hæredis*, and was accordingly bound to warrant whatever was completed by the donee before the felony; as any gift or demise for a term, provided the act was complete; for if it was not, as, from the nature of the thing, was the case in dower, it would not avail after a conviction for felony; nor was the donor, though he came *in loco hæredis*, bound to warrant it (b).

(a) Bract. 438. b.

(b) Ibid. 13.

We have hitherto been speaking of estates Gifts *ad terminum*. given to a man and his heirs; but land was sometimes given *ad terminum* or *ad tempus*, for a term; as for a (a) term of life, or years; that is, the life of the grantor, or grantee: or for a time; as where a gift was "till provision was made for the donee." In gifts of this kind it was important whether there was only mention that the donor should make provision, without saying any thing of his heirs, or both the donor and his heirs were included; and whether it was to be for the donee only, or the donee and his heirs. If the donor's heirs were not included, and no provision was made in the life of the donor or donee, the land remained in fee to the donee; but if provision was made in their lives, the land reverted to the donor by the form of the gift. If the heirs of the donor only were included, and not those of the donee, and neither the donor nor his heirs provided for the donee in his life, the land remained to the donee and his heirs in fee, although the heir of the donor or the donor himself was ready to provide for the heirs of the donee, after the donee's death. But if, on the other hand, the heirs of the donee and those of the donor were mentioned, and the donor provided for the donee, or his heirs, the land reverted to the donor; and should the donor have made no provision in his lifetime, it was not sufficient that his heirs were ready to do it, because the form of the gift required it to be otherwise. If there was no mention of heirs at all, then should the donor make no provision for the donee during their joint lives, the law was, that the land should remain in fee to the donee. If land was given for the life of the donee, and not of the donor, nor in fee, then it was considered as a freehold in the donee: if the reverse, then the law considered it as the freehold of the donor, and not of the

(a) This was called a holding *ad firmam*, and the persons so holding were called *firmarii*. *Fermo*, in the Italian, signifies a bargain or contract.

donee, because it might, if the donor died first, be revoked in the life of the donee, and revert to the heirs of the donor. Again, if a gift was made for the life of the donor to the donee and his heirs, then, should the donee die first, his heirs would hold it for the life of the donor, and they could recover in an assise of mortdauncestor, stating that their ancestor died seised *as of fee* (a): and if the donor died first, then, for the reason above given, it became the freehold of the donor and not of the donee. If there was no mention of heirs of the donee, yet the land needed not immediately, in such case, revert of course to the donor; for the donee might, if he pleased, make a testament of it, as of any chattel; and such a will, according to Bracton, was good in law.

If a gift was made by a man for him and his heirs without naming the heirs of the donee, and without saying expressly it should be for life, yet the land became the *freehold* of the donee as long as he lived. But should a gift be made *ad terminum annorum*, for a term of years, however long, even though it exceeded the usual length of man's life, yet the donee did not by such a gift obtain a *freehold*; because a term of years was a certain and determinate period, and the term of life uncertain; the uncertainty of the determination of the estate being what Bracton seems to consider as absolutely necessary to constitute a freehold-interest. A term of years was treated as an interest that did not at all impede any further disposition of the land so held; for the person who let it, might within the term make a gift of the land to another, or to the same person in fee. If it was to the farmer, one sort of possession would thus be changed into another; if to another, the possession of the farmer would still remain unimpaired; for a term and a feoffment of the same land might consist very well together. In such case, there

(a) Bract. 26. b.

would be different and distinct rights. To the feoffee would belong the property of the fee and the freehold; the farmer could claim nothing but the usufruct, that is, to enjoy the use and produce freely during his term, without any obstruction from the feoffee.

Land, says Bracton, might be given *at the will* of the giver, and so on as long as he pleased, *de termino in terminum*, and *de anno in annum*; under which lease the person taking had no freehold; the owner of the *proprietas* could at any time reclaim it, as being nothing in law but a precarious possession (a).

Another sort of gifts was to cathedral, conventual, and parochial churches, and religious men. These were said to be *in liberam eleemosynam*. They were sometimes *in liberam et perpetuam eleemosynam*; in which cases, the donee was not excused from the burthen of service: but if the gift was what they termed *in liberam, puram, et perpetuam eleemosynam*, then he was; and the donor and his heirs were bound to warrant the donee against all claims of the chief lord (b).

The next subject is the consideration the law had of the several before-mentioned gifts; all which were imperfect, till possession or seisin was given to the donee. The degrees of possession made a subject of very minute distinction and refinement at this time, and is discoursed on by Bracton (c) at length. It is sufficient to say, that the completest possession which could be had, was, when the *jus*, and *seisina*, the title to the land, and the seisin of it, went together; for the donee had then *juris et seisinæ conjunctio*; the highest of all titles (d). But this could not be obtained without a formal *traditio*, or *livery*; for land was not transferred by homage, nor by executing charters or instruments, however publicly they might be transacted, but by t^h donor giving full and com-

(a) Bract. 27. b.

(b) Id. ibid.

(c) Id. 38. b.

(d) Id. 39. b.

plete seisin thereof to the donee, either in person or by attorney. This was by publicly reading the charter (and if livery was made by attorney, by reading the letters of attorney) in presence of the neighbours, who were called together for that particular purpose; upon which the donor retired from the possession, both *corpore et animo*, without any intention of returning to it as lord; and the donee was put into the vacant possession, *animo et corpore*, with a resolution of retaining possession; in short, one party ceased, and the other began to possess it: for the donor never ceased to possess till the donee was fully in seisin; it being a rule of law, that the seisin could not remain vacant for the minutest space of time. This is the account given of livery by Bracton, who adds this definition of it: *de re corporali de personâ in personam de manu propriâ vel alienâ* (that is, of an attorney) *in alterius manum gratuita translatio*. And if livery was thus made by the true owner of the land, the donee had immediately the freehold by reason of the *juris et seisinæ conjunctio* (a).

There were some cases where livery was not necessary, and any expression of the owner's will, that the property should be changed, had the same effect as livery: thus, where land was lett for a term of life, or years, and afterwards the donor sold or gave it wholly to the donee, it became the property of the donee immediately: the same where a person was in possession by disseisin or intrusion (b); the law allowing, in these cases, a fiction to supply the fact of the land having really passed out of one hand into the other.

When a livery was made, it had the effect of conveying to the person to whom it was made, every thing the maker of it had: whether he had a mere right and property of the fee, a freehold, or usufruct, it all belonged to the donee. But for this purpose, it was not sufficient that the

(a) Bract. 39. b.

(b) Id. 40. b.

donee came into the occupation of part of the land; for if any person belonging to the donor remained on another part, he thereby retained the whole, notwithstanding the livery: and it was absolutely necessary towards completing the livery, that the donor and every one belonging to him should leave the land. If the person making livery had only the usufruct, yet he thereby gave to his feoffee a freehold, as far as concerned himself, and all others who had no right, though *not* as against the true owner. If he had nothing, nothing he could give; yet if a person was only in possession, let that be as inferior as might be, it is clearly laid down by Bracton, that he could give a *precarious* fee and freehold by livery (*a*). As livery might be made either by the donor in person or his attorney, so it might be accepted either by the donee or by his attorney (*b*).

Land might be transferred not only by a legal title, and livery thereon, but without title or livery at all, namely, *per usucaptionem*; that is, by continual and peaceable possession for a length of time; yet what length of time was necessary to give such a right, was not defined by the law, but was left to the discretion of the justices (*c*). Thus all intrudors, disseisors, farmers holding over their term, persons continuing in possession contrary to a covenant or the original form of the gift, if they were suffered to remain in that condition without any interruption for a length of time, gained a right and freehold. Though this was the law amongst subjects, in order to avoid dormant and litigious claims, yet in the case of the king it was otherwise; the maxim of *nullum tempus occurrit regi* having already obtained in his favour (*d*).

(*a*) It is worthy of remark, that this piece of old law was reconsidered, and after long discussion confirmed, 500 years after Bracton wrote, in a famous case in the King's Bench. Vid. Burr. Rep. 60.

(*b*) Bract. 41. b.

(*c*) Ibid. 51. b.

(*d*) Ibid. 52. and 103.

Rights. We have hitherto been speaking of *corporeal things*. It follows, that something should be said of *incorporeal*, and the methods of transferring them. These were called *jura* and *servitudes*, or *rights*; and being things neither visible nor tangible, could not pass by livery: they therefore passed by agreement of the parties contracting (a), and by a view of the corporeal thing to which they belonged; thus, by a fiction of law, they became what was called *quasi*-possessed; and he who was so in possession by fiction of law, had a *quasi*-use till he lost the possession by violence or by non user; for as possession of a corporeal thing could be lost by non user, so could a *quasi*-possession of an incorporeal thing. But when there was an actual user of an incorporeal thing, the possession was retained by the user, and became real, instead of fictitious; and when a person had thus made use of his right, he might transfer the right and the use to another, which before user he could not. If a person, however, who had an incorporeal right to him and his heirs, died without any user thereof, the title would descend to his heirs.

These rights were generally considered as, and were called *appurtenances* to some corporeal thing, as to a farm or tenement; and were commons, rights of advowson, and the like (b). An advowson and common were sometimes not appurtenant to any thing, but subsisted as independent rights (c). Of a nature similar to these were other incorporeal things, which were given by the king only, as liberties and franchises; such as jurisdiction and judicature, treasure-trove, waifs, tolls, exemption from tolls, and numberless other royalties, which were granted by charter from the king to the subject (d).

Besides the gifts above-mentioned, which, being transactions between man and man, were to take effect immediately, there was another sort, which was to take effect

(a) Bract. 93. b. (b) Ibid. 54. (c) Ibid. 54. b. (d) Ibid. 55. b.

after the donor's death: such a gift was called *donatio mortis causâ*. A gift of this kind was generally made by a person in sickness, or going upon a voyage, and had in it a tacit condition, that it should be revocable upon the recovery or return of the giver. Should a gift not be accompanied with this condition, it was a *donatio inter vivos*; and therefore, if made between husband and wife, was void. A *donatio mortis causâ* was confirmed by the death of the giver.

The principal gift of this kind was by testa-
ment; and this did not take place till after the death of the giver (a). The whole law of testaments stated by Glanville, is delivered by Bracton as law, and sometimes in the very words of that author; it will therefore be unnecessary to do more than notice such parts as are more explicitly treated by Bracton, together with such additions as he has made to Glanville's account (b). He says, that, generally, a wife could not make a will without the consent of her husband; yet that it had been usual (as was intimated by Glanville) (c) for the wife to make a will of the *rationabilis pars* which would come to her if she survived her husband, and particularly of such things as were given her for the dress and ornament of her person, as her clothes and jewels, all which might most properly be called her own.

Glanville says, that the administration of intestates' effects belonged to the nearest of kin; but Bracton says, that in such case, *ad ecclesiam et ad amicos pertinebit executio bonorum*. The law upon the subject of testaments is thus laid down by our author. The expences of the funeral were to be allowed out of the effects, and the widow was intitled to receive all necessaries thereout till her quarantine was expired, unless her dower was assigned before. If the deceased left no moveables, the heir was to be burthened with all the debts (d), as far as the inherit-

(a) Bract. 60.

(b) Vid. ant. 80.

(c) Vid. ant. 111.

(d) Bract. 60. b.

ance went, and no further. There were particular customs which directed a disposition of the effects somewhat differing from the general law: this was in some cities, boroughs, and towns. Among these, the city of London had a custom, that when a certain dower was appointed, whether in money or other chattels, or in houses, which were considered as chattels, the widow could demand nothing, beyond that, out of the effects, unless by the special favour of the husband, who might leave her more: and again, the children could not demand, by pretence of any custom, more than was left them by the testator, if he made a will. Bracton says, that a man could not make a will of a right of action, nor of debts not judicially ascertained, but that actions for such things belonged to the heir: yet, when these were once reduced into judgments, they became part of the *bona testatoris*, and belonged to the executors, under the direction of the ecclesiastical court (a).

Ecclesiastical
jurisdiction
therein.

Whatever doubt there might have been whether the ecclesiastical court entertained suits for the recovery of legacies in the time of king John (b), it is beyond a question, that in the beginning of Henry III. that branch of jurisdiction was firmly settled (c). It is probable, that legacies were a subject *mixti fori*, in the same manner as tythes long were, before they became entirely confined to the spiritual court; but it appears that the temporal courts in this king's reign so far gave up their claim, as not to prohibit the ecclesiastical judges. This article of jurisdiction might be thought not a very unlikely consequence to follow from the power of granting *probates*; but it is conjectured by a canonist of great authority (d), that it took its rise out of those laws in the code which made the bishop protector over legacies given *in pios usus*. It is consistent enough with the usual practice of churchmen in particular, and conformable with the inclination of courts

(a) Bract. 61.

(b) Vid. ant. 72.

(c) 2 Hen. III. Tit. Pro. 13.

(d) Lindewoode.

(*ampliare jurisdictionem*), to suppose that the ecclesiastical court might have gradually gained jurisdiction over all personal legacies, under colour of such as were given *in pios usus* (a). This might have been the first step towards it; but it is most probable, that there was a direct authority for this innovation derived from the canon law. For although the *Decretals*, where it is set forth as a general law, were not published by Gregory IX. till the 24th year of Henry III. the canon which warrants this point of judicature was much more ancient, and, without doubt, had travelled hither long before the collection of Gregory was made; and the authoritative promulgation by that pope, might give new sanction to an usage which had obtained some time before.

The granting administration of intestates' effects by the ordinary, though established on a more solid foundation, the express law of this country, by the charter of king John, and confirmed by that of Henry III. (b) did not prevail universally. It seems that lords in some places, in maintenance of their former right, still exercised some jurisdiction in the disposition of intestates' goods, in opposition to the authority of the bishops. The power hereby intrusted to the bishops was abused in a very shameful manner; for instead of taking order for a due distribution of such goods, when they had once got possession of them, they committed the administration of them to their own use, or the use of their churches, and so defrauded those, to whom, by right of succession, they belonged; and this they did with the pretence of law and conscience on their side, affecting that this disposition of them *in pios usus* very fully satisfied the requisition of law. This practice grew to such a height, as to occasion a constitution in this king's reign, enjoining that they should not dispose of them other-

(a) 3 Seld. 1675.

(b) This clause, as before observed, was left out of the *Inspeximus*, 25 Ed. I. and so is not in the common printed charters.

wise than according to the Great Charter, that is, to the next of kin; notwithstanding which, the practice still continued, and the right of succession was, by degrees, in a manner altered. It was even stated by the canons, as the law of the land (*a*), that a third part of intestates' effects should be distributed for the benefit of the church and the poor (*b*); which was in effect the whole that properly belonged to the intestate, after the *partes rationabiles* of the wife and children. These abuses of ecclesiastical judges gave occasion to two statutes, made in the reign of Edward I. and Edward III.

The last mode of acquiring property was *by*
Of descent. *succession.* The law of descent in the time of Glanville continued, with some small variation. We have seen that in Glanville's time the eldest son was the sole heir, in knight's service, and in most instances in socage (*c*); but it was now laid down by Bracton, generally, that, in both cases, *jus descendit ad primogenitum* (*d*). It was also now held, that all descendants *in infinitum* from any person who would have been heir, if living, were to inherit *jure repræsentationis*. Thus the eldest son dying in the life-time of his father, and leaving issue, *that* issue was to be preferred, in inheriting to the grandfather, before any younger brother of the father; which settled the doubt that had occasioned so much debate in the time of Henry II (*e*).

The rule of descent was, that the nearest heir should succeed; *propinquior excludit propinquum, propinquus remotum, remotus remotiorem*. Sometimes the right of blood constituted a particular sort of propinquity, to the prejudice of the male heir, who, in other instances, is so much favoured in our law; as in the following case: A man had a son and daughter by one wife, and after her death married another, and had a son and daughter by her;

(*a*) Decretal. lib. 5. t. 3. c. 42.

(*b*) 3 Seld. 1681.

(*c*) Vid. ant. 78.

(*d*) Bract. 64. b.

(*e*) Vid. ant. 79.

the son of the second marriage made a *purchase* of land, and died without children: in this case, says Bracton, the sister by the second wife would take, in exclusion of the other brother and sister. Some were of opinion, that this piece of law was entirely confined to cases of purchased lands, but that it was otherwise in cases of inheritance; for there respect was always to be had to the common ancestor from whom the inheritance descended; and the right should never come to a woman so long as there was a male, or one descended from a male, whether from the same father and mother, or not (*a*). Bracton, however, seems to think, that this rule of descent was to be observed in *inheritances*, as well as in purchased lands; because every one, as he came into seisin, made a *stipes* and a first degree (*b*): and so it was settled in the next reign, when this opinion of Bracton was adopted in the maxim, *seisina facit stipitem*. The impediment thrown in the way of descent by the rule, *nemo potest esse hæres et dominus*, still continued, though it was avoided by many devices; the most common of which was that of infeoffing to hold of the chief lord, and not of the feoffor; for this avoided the necessity of doing homage to the elder brother (*c*).

The law had provided a preventive against imposing supposititious children, to exclude *De partu supposito.* those who were next intitled to the inheritance. If a woman, either in the life of her husband, or after his death, had pretended to be pregnant when it was thought she was not, in order to disinherit the heir; the heir might have a writ commanding the sheriff to cause the woman to come before him, and before the guardians of the pleas of the crown, or before such person as the king should authorize to judge therein, and cause her to be inspected by lawful and discreet women, in order to inquire of the truth (*d*); and she was put in a sort of free custody during her preg-

(*a*) Bract. 65.(*b*) Ibid. 65. b.(*c*) Ibid. 68. a. b.(*d*) Ibid. 69. 70. a. b.

nancy, that the imposture, if any, might not escape detection. This was the way in which a woman was dealt with, when she falsely pretended to be pregnant. If the husband and wife agreed together in educating a supposititious child as their own, the right heir might have a writ *quòd habeas corpora* of the husband and wife before the justices, where the truth would be examined. Another person who had a temptation to play this trick upon the next heir, was the chief lord, who, when he had an heir in ward, and it died, would sometimes set up another, in order to continue the custody of the land; in which case, there was a writ and proceeding similar to the former (*a*).

Of partition. When an inheritance descended to more than one heir, and they could come to no agreement among themselves concerning the division of it, a proceeding might be instituted to compel a *partition*. A writ was for this purpose directed to four or five persons, who were appointed justices for the occasion, and were to *extend* and appreciate the land by the oaths of good and lawful persons chosen by the parties, who were called *extensores*; and this extent was to be returned under their seals, before the king or his justices: when partition was made in the king's court, in pursuance of such extent, there issued a *seisinam habere facias*, for each of the *parceners* to have possession (*b*).

Dower. It remains only to say a few words on the claim of dower, and then we shall have finished this part of our subject, namely, the title of private rights. Dower is defined by Bracton not in the words, but upon the ideas of Glanville (*c*). Dower, says he, must be *the third part of all the lands and tenements which a man had in his demesne, and in fee, of which he could endow his wife on the day of the espousals* (*d*): so that, according to Bracton, the claim of dower was still limited to the free-

(*a*) Bract. 70. b. 71.

(*b*) Ibid. 71. b. to 77. b.

(*c*) Vide ant. 72.

(*d*) Bract. 92.

hold of which the husband was seised at the time of the espousals, notwithstanding the provision of *Magna Charta*, which seemed to extend it to all the land that belonged to the husband during the coverture (*a*). The regular assignment of dower had been secured to widows by the chapter of *Magna Charta* just alluded to, and it was rendered more effectual, by a provision in the statute of Merton (*b*). More will be said of dower when we come to the remedies which the law had furnished for recovery of it.

Thus far concerning the law of private rights, as it stood in the time of Henry III.

(*a*) Vid. ant. 242.

(*b*) Vid. ant. 261.

CHAP. VI.

HENRY III.

Of Actions—Of Courts—Writs—Of Disseisin—Assise of Novel Disseisin—Form of the Writ—Proceeding thereon—Of the Verdict—Exceptions to the Assise—Assisa vertitur in Juratam—Quare ejecit infra Terminum—Assise of Common—Of Nuisance—Assisa Ultimæ Præsentationis—Exceptions thereto—Of Quare Impedit—Quare non Permittat—Assisa Mortis Antecessoris—Vouching of Warrantor—Where this Writ would lie—Writ de Consanguinitate—Quòd Permittat—Assisa Utrum—Of Convictions—and Certificates—Of different Trials—Dower unde Nihil—Writ of Right of Dower—Of Waste—Of Writs of Entry—Different Kinds thereof.

THE whole course of judicial proceeding, since the time of Glanville, had become a business of much learning and refinement; the writ, the process, the pleading, the trial, every part of an action was treated as a subject of intricate discussion. While these changes were made in the old remedies, new ones were invented, as more peculiarly adapted to certain cases than those before in use. Of all these we shall treat in their order.

Of actions. Actions are divided by Bracton into such as were *in rem*, or *in personam*, or *mixt*; that is *real*, *personal*, or *mixt* (a). Personal actions were for redress in matters *ex contractu*, and *ex maleficio*, as the Civilians termed it; and also in such as they called *quasi ex contractu*, and *quasi ex maleficio*. It follows, that of perso-

(a) Bract. 101. b.

nal actions arising *ex maleficio*, some were *civil*, and some *criminal*. Real actions are for the recovery of some certain thing; as a farm, or land: they were always brought against the person then in possession of the thing, and were for the recovery of it *in specie*, and not for an equivalent in damages (*a*). When an action was brought for any moveable, some thought that it should be considered as a real action, as well as personal, because the person possessed of it was to make restitution of the thing in question; but, says Bracton, this was, in truth, only personal; for the defendant was not obliged specifically to restore the thing demanded, but was only bound to the alternative of restoring the thing, or its price; and therefore, in such an action, the price of the thing ought always to be defined. A mixt action was so called, because it was *tam in personam, quàm in rem*, having a mixt cause on which it was founded; as the proceeding *de partitione* among parceners, and *de proparte sororum*; that for settling of bounds between neighbours and baronies *per rationabiles divisas*, or *per perambulationes*; in which each party seems to have been plaintiff and defendant, though he alone was properly plaintiff who commenced the suit.

Real actions were divided into such as were to recover *possession*, and such as were to recover the *property*; a distinction which will be very strictly observed in all we have to say on these actions, and was rigidly adhered to in applying them; it being a rule, that though a person who had failed in any proceeding for the possession, might resort to the next superior remedy, yet he could never descend. He might have an assise of novel disseisin; and if he failed in that, he might have a writ of entry (a new writ, of which we shall soon say more), and lastly a writ of right; but having begun with a writ of right, he could not avail himself of the other remedies (*b*).

(*a*) Bract. 102.

(*b*) Ibid. 104.

Some actions were permitted by law to be brought at any distance of time ; but, in general, actions were *limited* to be brought within a certain period, on account of the defect of proof which would happen in a course of years (*a*). Suits which were to recover such things as belonged to the king's crown, might be brought at any distance of time ; on which privilege of the king was founded this rule, that *nullum tempus currit contra regem*, or *nullum tempus occurrat regi* : and it should seem from Bracton's manner of expressing himself, that, inasmuch as the suits of private parties were limited, because, beyond a certain period, they could hardly be able to bring proofs ; the king, in concurrence with the privilege of instituting his suits without any limitation of time, should, in questions of antiquity, be intitled to throw the *onus probandi* on the defendant ; and on his failing, should recover without bringing any proof at all (*b*).

Of courts. Before we enter upon the proceeding and conduct of actions then in use, it may be convenient to premise a short view of the courts in which civil and criminal justice was administered : and first of criminal suits. Criminal suits, where a corporal pain was to be inflicted, used to be determined *in curiâ domini regis*, in the king's court ; which general expression is explained in Bracton by saying, that if the offence concerned the king's person, as the crime of lese majesty, it was determined *coram ipso rege*, by which was meant the great superior court, of which so much has been already said : if it concerned a private person, it was *coram justitiariis ad hoc specialiter assignatis* ; that is, we may suppose, either the justices in eyre or of gaol-delivery. These were all equally the king's courts ; and as the lives and limbs of his subjects were in the king's hands, either for protection or punishment, it was proper they should be subject to his

(*a*) Bract. 102. b.

(*b*) Ibid. 103.

decision only, unless in the few instances where persons enjoyed the franchise of holding a criminal court; as the franchises of *Toll* and *Tem*, of *Infangthef* and *Outfangthef*(a).

The courts for the determination of civil suits were as follow: Real actions might be commenced in the lord's court of whom the demandant claimed to hold his land; from whence they might be transferred, upon failure of justice, to the sheriff's court, and from thence to the superior one(b); but if such a suit was not removed for some cause or other, it might be determined in the court baron. In the county court were held pleas upon writs of *justicies*, as *de servitiis et consuetudinibus*, of debt, and an infinitude of other causes; among which were, suits *de vetito namio*, and pleas *de nativis*, unless it became an issue, whether free or not, and then the enquiry stood over till the coming of the king's justices; the question of a man's liberty being thought of too high consideration to be intrusted to an inferior jurisdiction.

Such civil actions, whether personal or real, which were determinable in the king's court, were heard before justices of different kinds. The different courts which were called the king's are thus described by Bracton: *Curiarum habet unam propriam, sicut aulam regiam, et iustituarios capitales, qui proprias causas regis terminant, et aliorum omnium, per querelam, vel per privilegium sive libertatem*; the latter part of which description he explains by instancing one who had a grant not to be impleaded any where but *coram ipso domino rege*; though it might be doubted whether *per querelam* is thereby explained, and whether that expression does not mean a distinct method of proceeding by *complaint*, similar to what we see at this day in the modern king's bench, and of which we shall have occasion to say more hereafter. Thus far of the *aula regis*. Our author proceeds, and says, *habet etiam curiam, et*

(a) Bract. 104. b.

(b) *Ad magnam curiam.* Bract. 105.

justitiarios in banco residentes, qui cognoscunt de omnibus placitis, de quibus auctoritatem habent cognoscendi; et sine warranto jurisdictionem non habent, nec coercionem; in which he seems to describe *the bench* as having no authority but by the writs returnable there. He goes on to mention the justices itinerant through the counties; sometimes *ad omnia placita*; sometimes *ad quædam specialia*; as to take assises of novel disseisin, of mortdaunce, and *ad gaolas deliberandas*, to deliver one or more particular gaols. As causes were sometimes removed from the court baron to the county, so, as appears from Bracton, and as was hinted above, were they removed before the justices itinerant, and from thence into the bench, or *coram rege* (a). These are all the courts spoken of by Bracton; and therefore it must be concluded, that the court of exchequer was still considered as identically the same with the *aula regis*; and that the *proprias causas regis* particularly meant the government of the revenue; which is perfectly consistent with the account before given (b) of this great court in its first origin, and before the bench had any existence.

Besides this express account of courts, there are scattered up and down Bracton's work several passages which give us intimation of the nature of these courts; the principal of which are the returns of writs. A comparison of such expressions, as they occur in the course of this chapter, will throw a new light on the judicature of the time.

Writs. The subject of writs seems to have been studied with great diligence; writs had been devised for a greater variety of occasions than in Glanville's time, and they were discussed with more precision and system. Bracton divides writs into different kinds, in this way. He says, there were some which were *formata super certis casibus, DE CURSU, et de communi consilio totius regni concessa et approbata*; and these could not be changed

(a) Bract. 105. b.

(b) Vid. ant. 48, 49. &c.

without the consent of the same power that framed them. There were others which he calls *magistralia*, and which were varied according to the variety of cases and complaints. These *magistralia brevia*, it should seem, from Bracton's account of them, were distinguished from, and put in contrast with, the *brevia formata*, as being changeable without the permission of the legislature (a). Those which gave *origin* and commencement to a suit (b) were called *brevia originalia*, and were called, some of them *aperta*, or *patentia*, and some *clausa*; such as arose out of these were called *judicialia*: these were varied according to the pleadings between the parties, and the particular purpose which they were to answer.

In discoursing on the nature of civil actions, we shall begin with those that were called *real*. In order to understand the design of the various real remedies which the law furnished, it will be necessary to attend to the manner in which they considered the occupation of land and its appurtenances, under the circumstances of a more or less complete enjoyment.

Of land, a man might have either what they called *possession*, or what they called *jus*, or *proprietas*. Possession was of various sorts, and divided by very nice distinctions. One was said to be *quædam nuda pedum positio*, which they called *intrusion*: and this contained in it, says Bracton, *minimum possessionis*, and *nihil juris*, being somewhat of the nature of a *desseisin*: in both it was a *nuda possessio*, till it received a *vestimentum* by length of time. Another was a precarious and clandestine possession, attended with violence, which acquired no *vestimentum* by length of time; and this, says the same authority, had *parum possessionis*, and *nihil juris*. A possession for term of years, as it gave nothing but the usufruct, was considered in a degree higher, as having *aliquid possessionis*, but *nihil juris*.

(a) Bract. 413. b.

(b) Ibid. 414. b.

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The next was for life, as dower, or the like; and this being a step higher, was said to be *multum possessionis*, but still *nihil juris*. The next degree was, where a person had the freehold and fee to him and his heirs; and then he was said to have *plus possessionis, et multum juris*: and he who had the freehold, fee, and property, united in himself, had *plurimum possessionis* and *plurimum juris*, which was called *droit droit*, and contained the highest degree of property and possession; except that, even then, some other person might have *jus majus*, or greater right (a).

We shall speak of the remedies applicable to these several kinds of possession in the order suggested by the above distinctions, beginning with the writ of *intrusion*. Intrusion was, when a person, not having the least spark of right, came into a vacant possession; as, after the death of the ancestor, before the heir or the lord entered. The person entitled to the reversion, in such case, might have a writ, which had been invented since the time of Glanville, and resulted from some of the artificial notions which we have just stated concerning possession. The form of this writ varied according to the circumstances under which the person bringing it claimed; whether he was the lord or the heir; whether he claimed upon the death of an ancestor, of a tenant in dower, or *per legem Angliæ*, or for life. The following was a more general form of it: *Rex vicecomiti salutem. Pone per vadium et salvos plegios A. quòd sit coram, &c. ad respondendum, or ostensurus quare intrusit se in terram, &c. quam B. qui nuper obiit, tenuit de eodem C. ad vitam suam tantum, et quæ, post mortem ejusdem B. ad eundem C. reverti debuit, ut idem C. dicit: et habeas, &c.*

Possession created a sort of right; it was adviseable therefore for the heir to eject the intruder within a year, or at the end of that time have recourse to this writ; for it is laid down by Bracton, that no one could be put

(a) Bract. 159. b. 160.

to answer for an intrusion of longer standing. Respecting this time of limitation, Bracton seems not very precise, for he afterwards says, at farthest, not at the distance of ten or twelve years, as was determined in this reign (a); but the claimant was then driven to his writ of entry, grounded upon the intrusion (b); a writ lately invented, of which more will be said in its proper place.

The next thing to be considered is, that wrongful possession which was obtained by ^{Of disseisin.} disseisin, and the method of redress the law directed to be pursued. Disseisin was now considered in a very large sense, and much beyond the idea to which it was first applied. It was not only when the owner, or his agent, or family, who were in seisin in his name, were ejected from the freehold unjustly and violently, without judgment of law; but also, when a house had been left without any one therein, and the owner, his agent or family, returning from his business, was denied admittance by one who had taken possession, it was a disseisin; if a man was obstructed in a free use of his freehold, that was a disseisin; for though he might remain in possession, the full extent of that possession was not enjoyed. If any one dug, or put sheep, or otherwise intruded upon, land, under claim of an easement (for if it was without a claim of right it was only a trespass); or, if a person made improper use of an easement he had a right to; this was a disseisin. Again, if a person was in seisin for life, or for years, or as guardian, or otherwise, and infeoffed another, in prejudice of the right owner; if a person distrained for services not due, or where they were due, exceeded the bounds of a reasonable distress; these were disseisins. In short, if one claimed to partake with the right owner, or raised an unjust contention against him, it was a disseisin of the freehold (c).

The above were disseisins without violence; others were

(a) 16 Hen. III.

(b) Bract. 160, 161. a.

(c) Ibid. 161. b. 162.

said to be violent; but, in order to understand what the law considered as a violent disseisin, we must see what the nature of *vis* was. *Vis* was of two kinds, according to Bracton: thus, there was *vis simplex* and *vis armata*. It is not difficult to conceive what was said to be *vis armata*: it was not only the coming with weapons of any sort, or finding them at the place where they were used; but if a person came with arms, and made no use of them, the terror of them might be thought so to have operated, as to make the disseisin seem to have been *cum armis*. *Vis simplex* is defined by Bracton to be *quotiens quis, quod sibi videri putat, non per judicem reposcit*; that is, wherever a person took the law into his own hands. This distinction of *vis cum armis* and *vis sine armis*, was important, as the penalty upon disseisors was proportioned thereto (a).

Whatever was the way in which the disseisin was committed, the law not only allowed but required the disseisee, *incontinenter, flagrante disseisinâ et maleficio*, to expel the wrong-doer. What was meant by *incontinenter*, Bracton thinks was pointed out by the term of fifteen days allowed to a tenant summoned in a writ of right. If the owner was present at the time of the disseisin, he was to eject the disseisor that very day, if possible, or on the morrow, or the third or fourth day; and beyond that time, provided he had uninterruptedly continued his endeavours, by calling in the assistance of his friends, and resuming the attack.

If he was absent when the disseisin was committed, then a distinction was to be made according to the distance; a reasonable time was allowed for his getting information of the fact, and for his arrival; and if he pursued his attack upon the disseisor within the stated time after such arrival, the law considered it as done *incontinenter*. As for instance, if he was out of the kingdom in, what was called, *simplex peregrinatio* to St. Jago, or in the king's service

(a) Bract. 162.

in Gascony, he had forty days, and two floods and one ebb; which latter indulgence was for the delay occasioned by the sea: and then he had the fifteen days after he returned, and also the four days above-mentioned, to resume the attack. If he was in a *simplex peregrinatio* to the Holy Land, he had a year allowed him, together with the fifteen and four days; but if he was in what they called a *general passage* to the Holy Land, the time was three years, together with the fifteen and four days.

Such was the time allowed by the law, for a man to redress the injury he had suffered; but if he permitted a longer period than that to elapse, he gave up this right, and lost both his natural and civil possession, as they called it, which were thenceforward in the disseisee, who could not afterwards be ejected but by judgment of law (a).

As to the power of redress by the act of the party injured, and the situation in which recourse must be had to the assise, the law may be shortly stated in this manner. For instance, I eject you from your freehold; you may have an assise. Again, I eject you, and you me, incontinently, *flagrante disseisinâ*; I cannot have an assise, because I only suffer what I had before done myself. Again, I eject you, and you eject me, incontinently, and I, again, incontinently eject you; still you may have an assise, and so *in infinitum*; for the true possessor may, by law, eject, incontinently, the wrong-doer, and an assise shall not be brought against him for it: but should the true possessor be negligent, after the disseisin, in pursuing the injury, he lost, as was before said, both his civil and natural possession, and had no redress but by the assise (b).

If the disseisor transferred the land on the day of the disseisin, or the day after, the donee might be ejected, incontinently, by the true owner, the same as the principal disseisor: in like manner also, the assise might be brought

(a) Bract. 163.

(b) Ibid. 164.

against both; against the first *ad pœnam*, and against the second *ad pœnam* and *ad restitutionem*. If a long interval had passed between the disseisin and the transfer, the second would not have been liable *ad pœnam*, but only to make restitution (a). Again, if the first wrong-doer was disseised by another, the true owner might either incontinently eject the last disseisor, or bring an assise against him; and if he deferred doing it, the first disseisor might do either. In all these cases of recovering possession by force, the sheriff, though not bound to interfere *ex officio*, might assist at the request of the disseisee; yet he was to take care how he acted, as he would be subject to an assise, in like manner as the person whom he meant to assist: he might take a part in these matters, either as a private friend, or officially as sheriff, to keep the king's peace (b).

Assise of novel
disseisin.

When the party disseised had neglected to avail himself of the authority the law gave him to recover possession while the injury was fresh, he was then to recur to the recognition of assise; that compendious way for recovering possession, which became now more practised then ever.

Every body who was tenant of a freehold *nomine suo proprio*, might have this remedy by assise; those therefore who were in possession, *nomine alieno*, as a guardian, an agent, the family of a man, or his servant; a *firmarius*, or fructuary (not being a *fædi firmarius*); an usurer, or guest; one who held from day to day, or from year to year; or an usufructuary who held for a term of years; none of these could bring an assise; but that remedy was left to him who was the *dominus proprietatis*, out of whose fee all those interests issued. It is laid down gravely by Bracton, that should a man be ejected from his ship, *quasi de libero tenemento*, he was no more entitled to an assise than if he had been dragged from his horse or carriage; though he makes a question concerning an ejectment from a wooden

(a) Bract. 164.

(b) Ibid.

house: to which he answers, that if it stood on his own land, whether adhering to the soil or not, an assise would lie; but if on the land of another, and there had been any prohibition or injunction against the building, or removal, the person on whose land it was built might have an assise; if there had been none, and it had been removed without any contest, he could not have an assise (*a*).

An assise lay not only against the disseisor, but against all his aiders and abettors, whether present or not; not only against those who did the fact, but against those in whose name it was done; or who, after it was done, concurred in or approved it; as by this avowal and ratification, they seemed to make themselves parties (*b*). It only lay against those, who were in some of the above ways parties to the fact, and therefore not against an heir, or successor to the disseisor; who, though liable to make restitution, were not to undergo a penalty for the disseisin (*c*). Nevertheless, where any of the parties died, or the assise had not been brought with such diligence as the law required, and the matter was not, by commencement of some proceeding, become *litigious*, as the lawyers called it; in such cases recourse was to be had, not to a writ of right, as formerly, but to a remedy which had been lately invented, called a writ *de ingressu*, or writ of entry; which has been so often alluded to, and of which more will be said hereafter (*d*).

The form of the writ of novel disseisin Form of the writ. differed from that in Glanville's time in nothing but in the return: the limitation was still, notwithstanding the statute, *post ultimum reditum domini regis de Britannia in Angliam* (*e*); but the return was *usq; ad primam assisam cum justitiarum nostri ad partes illas venerint*; according to the appointment of justices of assise, as directed to be made by *Magna Charta*. It seems, that upon this writ pledges of prosecution were to be taken

(*a*) Bract. 167, 168. (*b*) Ibid. 171. (*c*) Ibid. 172. (*d*) Ibid. 175, 176. (*e*) Vid. ant. 264.

by the sheriff only in case they had not been found in the king's court, or a promise given, which used in some instances to be accepted instead of pledges. The pledges were to be two at least, and such as were sufficient to pay the *misericordia* to the king, if the complainant should retract, or not prosecute his suit. If a husband and wife were complainants, two pledges were enough; and it was the practice to be contented with two, when there were more complainants than one; though it was thought safer that each should find two. Notwithstanding the clause commanding the sheriff *quòd faciat tenementum reseisiri de cattallis*, was still continued, this part of the writ, says Bracton, was never executed; but these were left to be estimated in the damages by the recognitors (a).

The other directions of the writ were to be executed as follow: In pursuance of *quòd tenementum faciat esse in pace*, &c. the sheriff was to see that the disseisor did not convey the land to any one, and that the disseisee made no entry thereon; and if an entry was made by any one, under any pretence whatever, he was to restore it to the true owner, so to remain till the next assise. As to sending the recognitors *ad videndum tenementum*, he was to cause a view to be had, not by one or two, but by the whole, if possible, or, at least, by seven; for an assise could not, says Bracton, be taken by less than seven, though it might, for particular reasons, be taken by more than twelve.

The reason of a view was, that there might be a certainty about the matter in question, both for the guide of the jurors in swearing, and the judge in giving judgment. The jurors were to see what the freehold was; whether it was land or rent; whether it was consecrated to the church or not; whether it was held solely, or in common. They were to see that the complainant did not put more in view than he had claimed in his writ, for then he would be amerced; though he might, if he pleased, put less. They

(a) Bract. 179.

were to see in what vill, in what *locus*, in what part of the *locus*, and within what bounds, the freehold lay. If it was a rent, they were to see the land out of which it issued, (an assise being the remedy for rents, in some cases where a distress failed): the like of common of pasture. They were to view not only the land where the common lay, but also that to which it was appurtenant (*a*); and thus, in all cases, the jurors were to have a view of the thing in question, for their better information (*b*).

It was the complainant's duty to attend and point out all the above circumstances to the jurors; and if he could not, and appeared totally ignorant of the matter, the writ of assise was lost, and the assise *cadit in perambulationem*, as they called it; that is, became, by consent of the parties, a perambulation to make a general enquiry concerning the locality, the metes and bounds of the land (*c*). It was a rule, that could the complainant point out the *locus*, but not the precise part thereof, it was sufficient if he was proved by the oaths of the recognitors to have seisin any where in the *locus* alleged.

If either of the parties failed to appear at the day appointed before the justices, his pledges were *in misericordia*; if neither of them appeared, the assise was void, and all, both principals and pledges, were *in misericordia*. If the disseisor appeared and confessed the disseisin, as in so doing he acknowledged an injury which was against the peace, he was to be committed to gaol. If the disseisor was absent, and the complainant present, together with the recognitors, though no one was present for the disseisor, the assise was still to proceed *per defaultam*; it being a rule, that the assise should on no account be delayed: in such case, however, the complainant was always examined as to the ground of his demand (*d*). The complainant might, at the time of appearance, make a *retraxit* of his complaint; for which

(*a*) Bract. 180. (*b*) Ibid. (*c*) Ibid. (*d*) Ibid. 182, 183.

his pledges, as was before said, would be amerced, unless he obtained the licence of the court for so doing (a).

When both parties appeared in court, the writ was to be read, and the matter of complaint enquired into. Bracton blames some judges, who immediately, after hearing the writ read, would proceed to ask the party complained of, what he could say against the assise: he thought it hasty and premature to put a person to answer, before the matter of the complaint was properly examined and established; for it was not yet known whether the proceeding was to be by an *assise* or by a *jury* (the distinction between which will be seen presently), whether the fact was a *trespass* or a *disseisin*: he thought, therefore, that, as in a question concerning the *proprietas*, the demandant was to shew by what right he claimed; in like manner, in this suit, it was not sufficient barely to propound a complaint, but to shew the *jus querelæ*, and how the complainant was entitled to make it.

The justices, therefore, for their own information, and to instruct the jurors, were to interrogate as to the particulars of the complainant's case; of what freehold he was disseised, whether land or rent, whether for life or in fee, whether by descent or purchase; of a rent, whether it issued out of a chamber or a freehold, whether for life or in fee; of the boundaries and size of the freehold, whether there was any ejectment from the freehold, whether it was by day or night, with arms or without, with robbery or without; and innumerable other circumstances which might constitute the merits of the case (b).

When these enquiries had been made, then, and not till then, was the tenant to be asked, if he could say any thing why the assise ought to remain. The matter of such objection might be found in the above interrogatories put to the complainant. If the tenant could shew no cause why

(a) Bract. 182. b.

(b) Ibid. 184.

the assise should remain, but at once denied he had committed any disseisin; he simply put himself upon the assise, and the assise proceeded, as they called it, *in modum assisæ*, that is, upon the simple question of disseisin; and if the jurors were present, or seven of them at least, against whom there was no cause of exception, they proceeded to take the assise; if they were not present, the assise was deferred to another day, when they were to appear, and the assise was to proceed.

If the jurors appeared at the next day, then the exceptions to them were to be stated. These were of various kinds. Bracton says, that was a good exception to a juror, which would be a good one to a witness. One rendered infamous by having been convicted of perjury could not be a juror, according to the rule expressed in the English of those days: "*He ne es othes worthe that es enes gylty of oth broken.*"

Any enmity against a party, any friendship with him, was a good exception. Being a servant, familiarity, consanguinity, affinity, unless the connexion was equally with both parties; being of the same table or family; under the power of a party, so as to be benefited or hurt; owing suit or service; being counsel or advocate; all these, and many others, were good causes of exception to jurors.

Of the verdict.
When the parties had at length agreed upon a juror, they could not afterwards reject him; and when the number was complete, the assise proceeded, the first juror having taken the following oath: "Hear this, ye justices, that I will speak the truth of this assise, and of the tenement of which I have had a view by the king's writ" (altering these words where the subject was a rent, a common, and the like), "and in nothing will omit to speak the truth. So help me God, and these holy gospels." After this, the other jurors, in order, repeated the following words: "That oath which the foreman here hath taken (a), I will

(a) *Talis primus hic.*

“ keep on my part, so help me God, and these holy gospels (a).”

After the oath was taken in the foregoing manner, the prothonotary, for the information of the jurors, was to rehearse the effect of the writ, in the following way: “ You shall say, upon the oath which you have taken, whether N. unjustly, and without a judgment, disseised B. of his freehold in such a vill, after the last return of the king, &c. or not.” In this situation of things the justices were to say nothing towards instructing the jurors, because nothing had been said by way of exception against the assise; but the jurors were to retire into some secret place, and there to converse with one another upon what they had in charge; and no one was to have access to them, or talk with them, till they had given their verdict; nor were they, on the other hand, by signs or words, to give the least intimation what their verdict was to be.

There often happened a difference of opinion between the jurors; in which case the court used, as it was called, to *afforce* the assise; that is, others, according to the number of dissenting voices, were added to the major part of the assise; and if they happened to agree, their verdict was held good; and the dissenting jurors were to be amerced *quasi pro transgressione*, says Bracton, as guilty of a sort of offence, in obstinately maintaining a difference of opinion.

When the verdict was given, judgment was delivered according to it; unless the jurors should have expressed themselves obscurely, and the justices were disposed to examine further into the matter: and should the jurors, or those who were added by *afforcement*, still be unable to declare plainly and fully what their meaning was, the method was, either to get the parties to agree the matter, or the judgment was adjourned into the great court, where it was finally to be determined. Another way of putting a point of doubt and

(a) Bract. 184. b. 185.

obscurity into a course of examination, was by *certificate*, the nature of which will be explained hereafter. When the assise failed to give a plain and intelligible verdict, it was the office of the justices to endeavour to elucidate it by interrogation and discussion. If the jurors were entirely ignorant of the matter, then, as in the former case, others were to be added who knew the truth; and if, after that, the truth could not be got at, they were to give their verdict upon the best of their belief, according to their consciences (*a*). Though it was commonly said, that truth was the province of the juror, and justice and judgment that of the judge; it seems, says Bracton, that judgment belongs to the jurors, inasmuch as they are to say upon their oath, whether one man disseised another. But yet, as the judge is to give a just judgment, it becomes him diligently to weigh and examine what is said by the jurors, to see whether it contains any truth, that he may not himself be misled by their mistakes (*b*).

If judgment was given for the complainant, the land was to be restored, with all its produce, received and to be received, from the disseisin to the time of the judgment; and, as the sheriff was commanded to keep the land in peace till the assise was taken, the disseisee was to recover damages for any unjust abuse or misuse of the land in that interval. The disseisor was to suffer certain penalties. He was to be *in misericordia regis*, in proportion to the nature of the disseisin; as, whether it was *cum armis* or without, so as the *misericordia* was never less than the damages: besides this, he suffered a penalty for the peace, if it had been violated. Again, if he had committed robbery with the disseisin, he suffered a triple penalty; for the disseisin, the *misericordia*; for the peace, imprisonment; and for the robbery, as it is termed by Bracton, a heavy redemption: he did not, however, lose life or limb, as the robbery was

(*a*) Bract. 185. b. 186. b.

(*b*) Ibid. 186. b.

not prosecuted criminally. The disseisor, if he was the principal in the fact, was also to give to the sheriff, on account of his disseisin, an ox and five shillings; but those who were only in aid, force, or counsel, did not, in general, pay this mulct to the sheriff, though in some counties they did. The disseisor was also to render damages, to be estimated by the oath of the jurors, and further, if need were, or the jurors had been excessive, to be taxed by the justices. But the justices were not to estimate the damages at a larger sum than the jurors had, unless it was a very clear case, that the jurors had taxed them much lower than was reasonable or proper (*a*).

This liberty of increasing the damages was allowed to the judges, in order that disseisins might never escape the proper punishment of the law; for, in those times of disorder and oppression, there were many great men who would commit disseisins for the mere purpose of making the most of the fruits and profits during the time they could keep their unlawful possession: and when they had raised great sums thereby, they could generally escape with a small *misericordia*, through the ill-placed lenity of jurors; who, when they, by their verdict, took from a disseisor the land, were unwilling to load him besides with heavy damages. For these reasons, it was expected that the justices should examine very carefully into the change that had been made on the land since the disseisin, either through the wilfulness or neglect of the disseisor, or any otherwise; all which he was to be compelled to make good, notwithstanding much of the damage might have happened by death of cattle and other accidents, which it was out of his power to govern: nor was any allowance to be made to a wrong-doer for improvements (*b*).

Exceptions to the assise. This was the manner of proceeding, when nothing was said against the assise, nor any ex-

(*a*) Bract. 186. b. 187. (*b*) Ibid. 187.

ception taken why it ought *to remain*, as it was called; but if the tenant did not chuse to put himself upon the assise, he might *except*, or plead such matter as would cause it *to remain*, that is, defer it for the present, or perhaps entirely destroy it. These exceptions were, to the writ, to the person of the complainant or tenant, and to the assise. Some exceptions to the writ deferred the assise, but did not destroy it: some exceptions to the person of the complainant entirely destroyed the assise: some exceptions were peremptory as to one person, and deferred the judgment, but were not peremptory as to another; as where the complainant was not entitled to the action, but some one else. The order of stating exceptions was this: if the writ was not good, there could be no further proceeding; but if that was good, then they resorted to the person of the complainant, to see whether he was entitled to the complaint; then to the person of the tenant, to see if he was the person against whom the complaint should be made; and last of all to the assise, to try *si tenens injustè et sine judicio disseisiverit ipsum querentem de libero tenemento suo* in such a vill, after such a period of time (a).

Thus, after the jurisdiction of the court was established, the tenant was to take his exceptions to the writ. Exceptions to the writ were many; if there was any thing faulty therein; a spurious seal; a rasure in a suspicious part, as where the names of the persons, or places, or things, were written (for a rasure in the legal part was not so important as in these points of fact); if the date was at all changed; if the complainant had had a former writ of mortuancestor, of entry, or of right, and so had not observed the order of writs. Again, any error destroyed a writ, though it did not destroy the assise. It was error, if the writ was against one who was possessed *nomine alieno*, as a *firmarius*. The assise could not proceed if there was an error in the name, as *Henricus* for *Wilhelmus*; and

(a) Bract. 187. b.

so in the cognomen, as *Hubertus Roberti* for *Hubertus Walteri*; so in the name of a vill whence a person took his description, as London for Winchester: even if the error was in a syllable, as *Henry de Brocheton*, for *Henry de Bracton*; nay, even in a letter, as *de Bracthon*, for *de Bracton*: again, in a name of dignity, as *Henry de Bracton præcentor*, when he was *decanus*; so of a thing, as *vineam* for *ecclesiam* (a).

Then followed exceptions to the person of the complainant; one of which was villenage, and its consequences; excommunication; that he had not a freehold; that he should distrain instead of bringing this writ; and many others. The tenant might next except to his own person; as for instance, that the action should have been against his ancestor or predecessor, and not against him (b). And last of all, having gone through exceptions to the writ and to the person, he might except to the assise, upon the circumstances of the case, by disputing how far the operative words of the writ were justified in fact; how far he *injustè et sine judicio—disseisivit eum—de libero tenemento suo—in tali villâ*; every term of which charge was open to a variety of remarks and objections (c).

All these exceptions, whether they were peremptory or dilatory, were equally *out of the assise* (which was merely to try the disseisin), and collateral to it; and therefore could not be determined by the recognitors of assise. We have seen, that in Glanville's time (d) such incidental matters were in general tried by duel, there being very few issues which are said by that author to have been usually tried by recognition; of which one was, *infra ætatem vel non*; another was, whether seised *ut de vadio*, or *ut de fædo*, and some others; as that of villenage, which was to be tried by the relations, and if they could not agree, by the vicinage; the gift of a fee, after a grant of the advowson (e),

(a) Bract. 188, 189.
from 204 to 212. b.

(b) Ibid. from 190 to 204.
(d) Vid. ant. 146.

(c) Ibid.
(e) Glanv. lib. 13. c. 20.

and others that may be seen in that reign; but, in general, points in debate that did not make the direct question of seisin, were tried by the duel. Since that time, the good sense of mankind concurring with the statute made by Henry II. concerning trials by recognitors, had so far prevailed over the habits of their ancestors, that suitors used commonly, when a fact was in litigation between them in a cause, to consent that *the truth thereof should be enquired of by a JURATA, or jury*, in preference to a trial by duel; and they accordingly used to *pray* the court that it might be so; with which prayer courts had been so long used to comply, that a jury had become the regular mode of trying a fact in dispute in a judicial proceeding. Thus there had gradually arisen a new sort of trial by recognitors or jurors, denominated a *jurata*; which was a tribunal chosen by consent of the parties themselves, and, on that account, differing somewhat in its constitution, design, and effect, from the *assisa*.

To mention only one mark of their difference, and leave the rest to be observed as occasion presents them: the *jurors* in a *jurata* were not liable to conviction for perjury, nor to the infamous judgment as the jurors in the *assisa* were; the reason for which, according to Bracton, was, because the *jurata* was a trial which the parties had themselves prayed to have, and therefore they had no reason to complain of its determination; while the assise (to follow his idea) was a specific remedy in a special case, to which and which only the parties were by the law confined for obtaining redress; and if the ends of justice were disappointed by those recognitors who were designed by the constitution to further it, they deserved a very severe animadversion. But, with submission, the reason of the conviction being allowed in one case, and not in the other, was not, it should seem, owing to any particular difference in these two trials, as practised in the time of Henry III. but because the Constitution of Henry II. had provided that

punishment for recognitors in the particular *assises* only, which were then invented. The devolving of questions upon recognitors to be tried by the consent of parties, was a practice that originated afterwards, and therefore was not within that provision: nothing can be a stronger mark of this trial not owing its existence to that famous law of Henry II. than the appellation of *jurata*.

The difference between *assisa* and *jurata* was a very common piece of learning in this reign. This distinction was always observed, and was never more nicely attended to, than when it happened, as it sometimes did, for an *assisa* to be called upon to discharge the office of a *jurata*; and, instead of deciding the direct point in the action, to enquire of some collateral matter. For when any issue arose upon a fact in a writ of novel disseisin, mortdaunce, and the like actions, which fact the parties agreed should be enquired of by a *jurata*; nothing was more natural, nor indeed more commodious, than, instead of summoning other recognitors, as in Glanville's time (a), that the *assisa* summoned in that action should be the jurors to whom they might refer the enquiry. This was generally the case; and then the lawyers said, *cadit assisa, et vertitur in juratam*; the assise was turned into a jury, and the point in dispute was determined by the recognitors, not *in modum assisæ*, but *in modum juratæ*.

Thus, then, the exceptions mentioned above would in this reign, as they were out of the assise, be determined, not *in modum assisæ*, but *in modum juratæ*; as it were, says Bracton, by consent of the parties; where one alleged one thing, and the other the contrary, and each prayed that the truth of what he said might be enquired of. And in this case, says he, there is no conviction; for if the other party would controvert the saying of the jurors, the law gave him full liberty to say that the *proof*

(a) Glanv. lib. 13. c. 20.

was false; the verdict of the jurors in this case being only a *proof of the exception*; every one being to prove the truth of his exception, and the person who replied to it being also bound to prove his replication, in which recourse was had to the jurors, merely for want of other proof.

This will be made clearer by giving an instance. Suppose the complainant stated his case by saying, that he married a wife having an inheritance, and after her death he was in seisin till such a one unjustly disseised him, and so was in seisin *per legem Angliæ*, for he and his wife had children between them. If the tenant did not, in answer to this, deny the disseisin, and put himself on the assise, to try whether he disseised him or not; he might deny some of the circumstances which the complainant had stated as making his title: he might except that they had no child; or if they had, that it died in the womb; or if it was born, that it was a monster, and not a child; or if it was a child and born alive, that it was not heard to cry between four walls: when the complainant to such a plea replied the contrary, the truth of the allegation was then to be enquired of by the assise *in modum juratæ*. In the former case, of the general issue *disseisivit vel non*, the jurors, if they swore falsely, would be liable to conviction; in the latter, they would not (a).

The instances in which an assise might be turned into a jury, were as numerous as the exceptions that might be taken to the complaint. We shall content ourselves with adding one more example to those already given; and this, being a very particular one, deserves our notice. An assise was sometimes turned into a jury *propter transgressionem*, on account of a trespass: as where a person made use of another's land against the owner's will; or where he used, as his own, the land of a person holding in

(a) Bract. 215. b. 216.

common with him; these might be disseisins and trespasses both; for every disseisin was a trespass, though not every trespass a disseisin. If then the entry upon the stranger's land was without any claim of right, it was not a disseisin, but a trespass. But as it was uncertain *quo animo* this was done; the complainant used generally, in such case, to bring an assise as for a disseisin, and then the judge was to examine whether it was done with a claim of right: so that, if it should turn out that he made the entry through a probable error and ignorance, and under such mistake cut down trees, or the like, and did not do it in the name of seisin, he was cleared of the imputation of a disseisin, and it was considered rather as a trespass; for which, if he acknowledged the fact, he was to make amends; if he denied it, the assise was turned into a jury to inquire of the trespass (a).

An assise was sometimes turned into a jury *propter transgressionem districtionis*, on account of a trespass committed in distraining; for a distress sometimes amounted to a disseisin, sometimes was only a trespass; and was accordingly determined, in the former case *in modum assisæ*, in the latter *in modum juratæ*. When an assise, therefore, was brought upon an injury suffered by a distress, if it could not be maintained as an assise to determine the disseisin, it might be maintained as a jury to determine the trespass (b).

From what is here said, and the little mention there is in Bracton about any original specific proceeding in case of trespass, it should seem, that though there might be a writ of trespass, it was rarely brought for entries upon land; but the usual way of considering such matters was in an assise, where the complainant was sure of inflicting some penalty on the wrong-doer, either as a disseisor or a trespassor. It should seem that the writ of trespass was a late invention not wholly approved by Bracton; for it is

(a) Bract. 216. b.

(b) Ibid. 217.

said in another part of this author's work, that the writ *quare vi et armis* a person entered land, would be bad, because it would be making a question of the *mode* of the trespass, when it should be for the trespass simply.

To return to the assise of novel disseisin : This assise, according to Bracton, had three considerations : it was personal, *propter factum* ; penal, *propter injuriam* ; and thirdly, it was for restitution of the thing taken. As far as its object was penal (and *pœna suos tenere debet autores*), it did not lie for the heir of the disseisee, nor against the heir of the disseisor, if he died in the life of the disseisee ; for the penalty was extinguished with the person, and the heir was not to be punished for the offence of his ancestor : nor, in like manner, would an action lie for the heir of the disseisee ; for as between him and the disseisor there was no obligation *quoad pœnam*, though there was *quoad restitutionem* ; but his remedy was by a writ *de ingressu*, since called a writ of entry. As to this writ of entry, and when it lay in the nature of an assise of novel disseisin, for an heir to recover possession, it was to be seen whether the ancestor had been properly diligent in procuring and prosecuting his suit so as to have got a view, and the jurors sworn ; for then, by so doing, the assise of novel disseisin, in case of his death, was said to be perpetuated ; that is, the right of action for the disseisin, so far as concerned the restitution, continued to the heir of the disseisee against the disseisor and his heirs. Some were of opinion, that, in this case, the action would hold *quoad pœnam* likewise against the disseisor ; and though the assise was not prosecuted so far as the view, and electing the jurors, yet if as much diligence as possible had been used, though no action was commenced, the writ of entry was nevertheless continued to the heir of the disseisee *quoad restitutionem* (a).

The form of the writ of entry, when brought after an

(a) Bract. 218, b.

assise, was as follows: *Præcipe A. quòd justè, &c. reddat B. tantum terræ cum pertinentiis in villâ, &c. in quam non habet ingressum nisi per C. patrem ipsius A. cujus hæres ipse est, qui prædictum B. inde injustè et sine judicio disseisivit, et postquam, &c. et unde assisa novæ disseisinæ summonita fuit coram justitiariis nostris ad primam, &c. et visus terræ captus, et remansit assisa capienda, èo quòd prædictus C. obiit ante captionem illius assisæ (or, antequam justitarii nostri in partes illas venerint). Et nisi fecerit, &c.* These writs of entry grounded upon a disseisin, varied according to the circumstances which had happened since the disseisin. One was, *in quam ingressum non habet nisi per C. filium et hæredem D. qui terram illam ei dimisit postquam idem D. injustè et sine judicio disseisiverit ipsum B. &c.* Another was, *in quam non habet ingressum, nisi per talem, qui injustè et sine judicio disseisivit talem postquam idem talis disseisiverat querentem (a).*

In this writ the heir of the disseisor might have almost all the answers and defences which the disseisor himself, if he had lived, might have had against the assise of novel disseisin; inasmuch as this writ was in the nature of an assise of novel disseisin in all respects that regarded restitution, though not *quoad pœnam*; and all such matters would be determined by a jury. Bracton says expressly, that no corporal pain was to be inflicted by this action, on account of the disseisin of the ancestor; nor damages; nor was the customary ox to be given to the sheriff (*b*); but only the *misericordia* was to be paid for the unjust detention (*c*).

This writ of entry grounded upon a disseisin, like other writs of entry, was an invention since the time of Glanville, and was the result of that refinement which had pervaded all parts of the law relating to *seisin* and *property*.

(a) Bract. 219.

(b) It seems that there was a custom for the sheriff to demand an ox for every disseisin proved.

(c) Bract. 220.

The earliest mention of these writs is in the third year of this king; when they are spoken of as in common use, and therefore it is probable that they were introduced not long after Glanville's time (a). We shall have occasion to treat more particularly of these new writs in their proper place. The writ which next presents itself is another remedy concerning possession, which also had been contrived since Glanville's time, and has since been called the writ of *Quare ejecit infra terminum*.

Such were the notions concerning land, that *Quare ejecit infra terminum*, while one person had a freehold in a tenement, another might, says Bracton, have at the same time the usufruct, the use, and the habitation (b). As we have been shewing how a man was to be restored to his freehold if he was ejected, we shall now see what was to be done, if a person was ejected before the expiration of his term in the usufruct, use or habitation of a tenement which he held for term of years. Such persons, when ejected within their term, used sometimes to bring a *writ of covenant*; but as that only lay between the person taking and person letting, (who alone were parties to and bound by the covenant) and the matter could not be determined, if at all, but with great difficulty in that way; provision was made, says Bracton, by the wisdom of the court and council (c) for a farmer against all persons whatsoever who ejected him, by the following writ: *Præcipe A. quòd justè et sine dilatione reddat B. tantum terræ cum pertinentiis in villâ, &c. quam idem A. qui dimisit, &c.* or thus: *Si talis fecerit te securum, &c. ostensurus quare deforreat, &c. tantum terræ cum pertinentiis in villâ, &c. quòd talis dimisit ipsi, &c. ad terminum qui nondum præteriit, infra quem terminum prædictus, &c. illud vendidit, &c. occasione cujus*

(a) Bract. 219.

(b) These terms *usufructus*, *usus* and *habitatio*, are borrowed from the civil law, and there stand in as near a relation to each other, as they are placed in here. Inst. lib. 2. Tit. 4, 5.

(c) *De concilio curiæ provisum.*

venditionis ipse, &c. postmodum, &c. de prædictâ terrâ ejecit, ut dicit; et habeas ibi, &c. or, Si A. fecerit te securum, &c. tunc summane B. quòd sit coram, &c. ad respondendum eidem A. quare injustè ejecit eum de tanto terræ, &c. quam C. ei dimisit ad terminum qui nondum præteriit, infra quem terminum, &c.

If this writ lay against a stranger *propter venditionem*, much more ought it to lie against the person himself who demised the land, if he ejected his own farmer. In such case the writ was, *quam C. de N. ei dimisit ad terminum qui nondun præteriit, infra quem terminum prædictus C. de eâdem firmâ suâ injustè ejecit, ut dicit; et nisi fecerit, &c.* and this was, with little variation, the more common form in case of ejectment by a stranger. These writs were drawn in two ways, both of which we have noticed in the above instances; the one of a *præcipe*; the other two of a *si te fecerit securum*. The *præcipe* was thought the best and most compendious proceeding, on account of the process of caption of the land into the king's hands, which lay upon that writ; and the avoiding the tediousness and delay of attachments, which was the process upon the writ of *si te fecerit securum, &c.* though we shall see, in aftertimes, that the latter became the most common and best known of the two, being that which, from the words of it, was called a *quare ejecit infra terminum*(a).

Assise of com- Thus have we gone through the remedies
mon. which the law had provided, where an injury was done to a man's seisin of a freehold. It follows next in order, to speak of injuries done to a seisin of things appurtenant to a freehold, such as common of pasture, and the like. We have seen, that in Glanville's time there was an assise of common of pasture, by which the complainant might recover his seisin of a common, the same as seisin of his land; and that there was a writ directing an admeasurement of pasture to be made, where any one had sur-

(a) Bract. 220.

charged the land. The forms of these two writs were the same now as in his time (*a*). The writ of admeasurement was executed by the sheriff, who was to go in person to the place where the common lay, and cause the hundredors and all who were interested in the admeasurement to meet; and there, in presence of the parties to the writ, if they obeyed the summons to appear, and after hearing their allegations, he was to make inquiry, by the oaths of such neighbours by whom the truth could best be known, and by the inspection of charters and instruments, how the right was; and, according to that, he was to admeasure and allot the common (*b*). This was the writ upon which admeasurements were usually made. But where a person overcharged his common beyond what his ancestors had ever claimed, the admeasurement used to be made by a writ, invented since Glanville's time, to the following effect: *Si A. fecerit, &c. tunc, &c. quòd sit coram justitiariis ad primam assisam, ostensurus quare superonerat, &c. aliter quàm C. pater ipsius B. cujus hæres ipse est, consuevit*: upon which the justices were to proceed as the sheriff in the former instance did, and a summary inquiry was made concerning the matter in dispute (*c*).

Another writ had been introduced, called a writ *de quo jure*. Where a person had recovered seisin of a common in an assise, grounding his title upon usage and sufferance merely; as this determined only the seisin, the chief lord might bring this writ to make the tenant shew *QUO JURE exigit communiam pasturæ, &c. desicut ille nullam communiam habet, &c. nec servitium ei facit quare, &c. habere debeat, &c.* (*d*).

The writ in Glanville to the sheriff, commanding him, that *præcipias R. quòd, &c. permittat habere H. aisiaimenta sua, &c.* (*e*) was preserved, with some small difference in

(*a*) Vid. ant. 190. Bract. 224 and 229. (*b*) Ibid. 229. (*c*) Ibid. 229. b. (*d*) Ibid. 229. b. 230. (*e*) Glanv. lib. 12. c. 14. Vid. ant. 174.

the form. He was directed, that *justicies R. quodd, &c. permittat H. habere rationabile estoverium, &c.* as the case might be, of wood, turbary, and the like (a).

Of nuisance. As a nuisance, being an injury to a freehold, was considered in the nature of a disseisin, and like that might be redressed by an assise; so also, like that, it might, *flagrante facto*, be removed by the party injured without any ceremony of application to the law: but after the party had laid by, he had, as in case of a disseisin, no redress but by writ (b).

There is no mention in Glanville of any other writ of nuisance than the assise. We find now several writs to the sheriff upon questions of nuisance. One of these was, *Questus est nobis talis, quodd talis injustè et sine judicio levavit quendam murum* (or whatever it might be) *ad nocumentum liberi tenementi sui, &c. post reditum nostrum de Britanniâ in Angliam* (c): *Et ided tibi præcipimus, quodd loquelam illam audias, et postea eum inde justè deduci facias, ne ampliùs, &c.* In the same manner writs might be formed, *quare, &c. prostravit injustè ad nocumentum liberi tenementi; quare, &c. viam obstruxit, &c. quare divertit cursum aquæ, &c.* and so on, in numberless cases of injury and nuisance to a man's freehold (d). These last writs authorized the sheriff to hear and determine the matter; and so were to all intents and purposes writs of *justicies*, though that word was introduced only in the following: *Justicies, &c. quodd, &c. permittat H. habere quandam viam in terrâ suâ, &c.* The writ of assise of nuisance did not differ in form from those in Glanville, except in the return now used

(a) Bract. 231.

(b) Ibid. 231. b.

(c) We have before seen that by the Stat. Mert. writs of novel disseisin were not to exceed *primam transfretationem domini regis qui nunc est in Vasconiam*, Vid. ant. 264. Notwithstanding which, we find Bracton states this writ with a different limitation. It is not easy to account for this want of agreement between our author and the statute. Vid. ant. 325.

(d) Bract. 233.

in all assises, *coram justitiariis nostris ad proximam assisam* (a). The proceedings upon this writ were the same as in an assise of novel disseisin of a freehold. So much were assises of common and of nuisance considered in the same light as assises of freehold, that where either of the parties died after the injury done, and the writ was to be brought by or against the heir, we find a sort of writ of entry was formed, in the nature of those we before mentioned for recovery of lands: *Præcipe quòd, &c. reddat B. communiam pasturæ, &c. Præcipe quòd, &c. relevari faciat et reparari quoddam fossatum, &c. Præcipe quòd permittat talem relevare, &c.* (b): adapted, in the words of them, to the nature of the case, without any mention of an entry, which indeed would have been incoherent and absurd.

A nuisance was so much in the nature of, and approached so near to, a disseisin, that sometimes it might be considered in either light; and it was difficult to say which it properly was. Suppose a person caused water to overflow; if it rose upon the complainant's own freehold, which it most probably would if he had land on both sides, this was thought rather a disseisin than a nuisance; but if it rose only on the freehold of the wrong-doer, and from thence incommoded that of the complainant, it was then only a nuisance, because the fact was all in the wrong-doer's land. But if part was in one, and part in the other, and the water run over both grounds; then, for one part he might have an assise of novel disseisin of freehold; for the other, an assise of nuisance; so that here would be two assises on account of the same land; in which case, of the two remedies, if one was to be chosen, Bracton advises the assise of nuisance, as the most likely to remove the whole mischief: for the assise of novel disseisin, as it was confined to the freehold, could not correct the nuisance which was upon the other's land; while the assise of nui-

(a) Bract. 233. b.

(b) Ibid. 235. b. 236.

sance, by removing the cause, effected both (*a*). A man might commit a disseisin and two nuisances, by doing one fact on his own ground. If he cut a ditch across a road which led to a pasture, he, at once, committed a disseisin of the common; caused also one nuisance by obstructing the way, and another by diverting the water from its proper channel (*b*).

Among other nuisances, a liberty or franchise might be a nuisance to another liberty or franchise; as where the liberty of holding a market was granted, so as not to become a nuisance to a neighbouring one. Now, a market was said to be *vicinum*, or neighbouring, if it was six miles and a half (*c*), and one-third of the other half distant from another; which distance was computed with a view to the following considerations: supposing a day's journey to be twenty miles, and the day was divided into three parts, the first part would suffice for the journey thither; the second, for buying and selling; and the third, for returning home in reasonable time before night. A market, if raised within this distance, was to be put down; yet a market to be held two or three days *after* another, though within that distance, could not be said to be injurious; and, accordingly, a market was not considered as a nuisance (*d*), unless it was held before or at the time of another.

Before we take leave of assises of novel disseisin, it will be necessary to remark two or three particulars relating to them in general. If a disseisin happened *infra summonitionem justitiariorum*, there was no need of applying to the *curia regis* for a writ; but the itinerant justices would make one themselves, in this form: *Talis de tali loco, et socii sui justitarii itinerantes in tali comitatu tali salutem. Questus est nobis*, and so on, as in other writs; only instead of the term of limitation, these words were inserted, by way of

(*a*) Bract. 234. b. (*b*) Ibid.

(*c*) *Sex leucæ*. Spelman says, that in Domesday, and our old writers, *leuca* signifies a mile. Spel. voce *Leuca*.

(*d*) Bract. 235.

giving jurisdiction to the court, *infra summonitionem itineris nostri* (a).

We have seen what provision was made by the statute of Merton in case of re-disseisin (b). If a person recovered seisin by judgment of the justices itinerant, and was put in seisin by the sheriff, and was afterwards disseised by the same disseisors; they, being convicted thereof, were to be taken and detained in gaol, till released by the king or otherwise; and for the purpose of taking the offenders there issued the following writ to the sheriff: *Monstravit nobis talis, quòd cùm ipse recuperasset*; mentioning the assise, and so on; *ipse talis, &c. iterum, &c. disseisivit: et idèo tibi præcipimus, quòd assumptis tecum custodibus placitorum coronæ nostræ, et 12 tam militibus quàm aliis liberis et legalibus hominibus, &c. diligentem facias inquisitionem, &c. Et tunc ipsum capias, & in prisonâ nostrâ salvò custodias, donec aliud inde præceperimus, et inde tali seisinam suam rehabere facias, &c.* And, in like manner, in all cases where seisin was recovered in court, whether by assise, recognition, jury, judgment, concord, or otherwise, and the recoverer was turned out, a writ of *monstravit* to this effect might be had (c).

Next, as to the writ of execution to give seisin to the complainant. When an assise happened, as it sometimes did, to be taken out of the county, and the person who brought the assise complained in the county that he had not yet got his seisin, there issued a writ to the following effect to the sheriff: *Scias quòd A. &c. recovered by assise; et idèo præcipimus, quòd per visum recognitorum ejusdem assisæ, &c. plenariam seisinam habere facias, &c.* the writ being still varied, according as the disseisin was confessed, or otherwise. To every writ was added this clause: *Et etiam pro damnis ei adjudicatis infra quindenam facias ei decem solidos habere, ne inde clamorem audiamus pro de-*

(a) Bract. 236. b.

(b) Vid. ant.

(d) Bract. 236. b. 237.

fectu, &c. If seisin had been recovered before the justices in the county, and the complainant was hindered from getting possession by the power of his adversary, he might have the following writ to the sheriff: *Questus est nobis, &c. quòd cùm in curiâ nostrâ recuperâsset seisinam, &c. idem, &c. non permittit eum uti seisinâ suâ; or seisinam suam nondum habet, secundum quod ei fuit adjudicata. Et ideo tibi præcipimus, quòd diligenter inquiras qui fuerunt recognitores ejusdem assisæ, et per eorum visum, &c. plenariam seisinam ei habere facias, et ipsum in seisinâ suâ manuteneas, et defendas; or thus, non permittas, quòd talis ei molestiam inferat, vel gravamen, quominus idem, &c. uti possit seisinâ suâ, ne ampliùs, &c. (a)*

Assisa ultimæ præsentationis. We have hitherto spoken of such remedies as were furnished when a person was disseised of his freehold, or of some easement and right appurtenant to his freehold, and arising out of that of a stranger. We are now to treat of appurtenances and rights which arise in a man's own ground; as of the seisin of a presentation; and when a person was impeded in the use and enjoyment of his own seisin thereof, or that of his ancestor. When a person presented to a vacant church, to which himself or his ancestors had before presented *tempore pacis* (for every one must have a seisin of his own, or of his ancestor who last presented), and was impeded or deforced by any one who contested the presentation; this was to be determined by an *assisa ultimæ præsentationis*, as we before mentioned in the reign of Henry II (b). As this assise could only be brought by one who had had seisin himself, or whose ancestors, to whom the advowson had belonged, had had seisin, those who held by feoffment, and not by descent, could not maintain it, unless they had, in fact, made one presentation: for they could not claim of the seisin of those whose heirs they were not, in an assise, any

(a) Bract. 237.

(b) Vid. ant, 185.

more than they could in a writ of right; nor could one who held for life, as in dower, or the like; all which persons were redressed by another sort of writ (*a*).

The *assisa ultimæ præsentationis*, or the writ of *darrein presentment*, as it was afterwards more usually called, differed in one or two particulars from that in Glanville's time. The present began, *Si talis te fecerit securum, &c.* the former was a simple summons. The present was made returnable; sometimes, according to Bracton, *coram justitiariis nostris ad proximam assisam* (notwithstanding the provision of *Magna Charta* to the contrary) (*b*); sometimes *apud Westmonasterium*.

The process on this writ was as follows: At the first day each party might esoin himself, if he pleased. If both made default, the suit failed, and the writ was lost. If the disturber only of the presentation was present, the judgment was, *quòd recedat sine die*. If the complainant only was present, then it was first to be seen, whether the disturber had been summoned, or not: if he had, and the summons was testified by the proper summoners, then he was to be resummoned; but if he had not been summoned, or the summons was not proved, or, upon appearing, he objected that he had not been summoned, or the summons was not a reasonable one, another day was given him; and at that day, if the summons was proved, or not denied, there issued a writ of resummons, by which he was summoned to hear the recognition that had been arraigned, with the addition of this clause, *et ad ostendendum quare non fuit coram, &c. sicut summonitus fuit, &c.* At the day appointed, if he made his appearance, he was not permitted to take such objection to the summons as would delay the assise, whether the first or second summons was proved or not, as the day had been appointed before, and he knew he was to be summoned; and if he did not come, the assise

(*a*) Bract. 237. b. 238.

(*b*) Vid. ant. 245.

was taken by default, provided the jurors were present. If they were not present, then there issued to the sheriff a writ, which sometimes was, *quòd venire facias*, &c. sometimes *quòd habeas corpora*, &c. (a) for the jurors to be present at another day; at which time if he did not appear, the assise would be taken by default.

Again, if at the first day of summons the tenant essoined himself, and had another day given, and did not appear at it, the assise was immediately taken by default, without any re-summons; also, if he appeared, and the jurors not, there was always one essoin on account of the appearance.

In this manner was a re-summons allowed when the assise was taken out of the county, or before the justices specially assigned. But before the justices itinerant in that county *ad omnia placita*, no re-summons, nor the delay of fifteen days were allowed, if the tenant was in the same county with the church in question at the time of the iter; but the assise was taken by default, the same as an assise of novel disseisin (b). Again, a re-summons was not allowed as against a person within age, nor a minor; nor where the tenant had been seen in court, and had contumaciously gone away. In short, in every assise but that of novel disseisin, there was at the first day either an essoin or a re-summons; but at another day, there was no re-summons after an essoin; nor, on the contrary, an essoin after a re-summons; but the assise was immediately taken by default, as some said: and Bracton was further of opinion, that even the essoin *de servitio regis*, though it lay after an essoin and re-summons in every assise where they lay, would not hold in this assise *ultimæ præsentationis*, which, as well as an assise of novel disseisin, was excepted

(a) It does not appear from Bracton what rule governed in the application of one or the other of these writs; much less can it be collected that the *habeas corpora* never issued but after the *venire facias*, as was the course in later times.

(b) Bract. 238.

from this essoin, for the sake of expedition and dispatch. We have been more particular in this account of the practice in re-summons, because it is applicable to all the remaining assises of which we shall have to treat (a).

If, after these summons, re-summons, and essoins, the deforceant did not come, would not answer, or contumaciously left the court; the assise, as we said before, was taken by default. If he appeared, and could say nothing why the assise should remain, it proceeded at once; the deforceant, in this assise, being allowed to call no warrantor, because the assise was taken generally, for him who had the right of presenting (b).

When the complainant and deforceant appeared, and the latter was disposed to say something against the assise, then, says Bracton, it became the complainant to state his case, (or, *profundare intentionem*, as it was called), and shew what title he had to the action; after which the deforceant was to state his exceptions to the *intentio* of the complainant, and shew why the assise should remain. The matter of the intention and exception was what constituted the merits of the title, and was collected from the effective words of the writ: *Quis advocatus—tempore pacis—præsentavit—ultimam personam—quæ mortua est—ad ecclesiam talem—quæ vacat, cujus advocationem dicit ad se pertinere*: that is, who was the real *patron* and owner of the advowson, and that he was not a guardian or farmer, or tenant for years, who possessed *nomine alieno*, or for life, or by intrusion, or disseisin; who, besides not being properly owners, had never, perhaps, presented, and therefore never had gained seisin of the presentation:—whether he obtained this right in times of quiet and *peace*, and not by usurpation and oppression: whether the *presentation* was rendered complete by institution; for since the Constitution of the Council of Lateran, ordaining that present-

(a) Bract. 239.

(b) Ibid.

ations should lapse to the bishop if the patron did not present in six months, had been adopted in our law, it oftener happened that presentations, not being in time, were disputed:—whether it was a *parson* that was presented; for an assise did not lie of a vicarage or prebend, nor of a chapel:—whether his *death* was natural or civil, as by entrance into religion, resignation, or, what was the same, marriage, or any other act which disabled him from holding his church; and whether it was *vacant*. The question of vacant, or not, was to be determined by the ordinary, who was the proper and legal judge thereof (*a*).

Exceptions thereto. From the above-mentioned articles of the writ might be extracted exceptions, both to destroy and defer the assise; but should the deforçant admit them all, he might still except against the assise in various ways. He might say, that the complainant who grounded his assise upon the seisin and presentation of his ancestor, after that presentation made a gift of the advowson, either by itself, or with the freehold to which it was appendant, to the deforçant himself, by a charter, which he there produced; and therefore, that though the ancestor might present, yet he could not for that reason present after. To this the complainant might reply, that after the charter mentioned he presented *N.* who was admitted, so that the charter was void, and the gift null; and this he could prove by the assise taken *in modum juratæ*, unless the deforçant chose to make a *triplicatio*, or rejoinder, and say, that though that charter might be void, and the gift null, by such second presentation of the donor; yet after such second presentation, he made another charter to him confirming the former, which had been invalidated by the second presentation: and this he might offer to prove by the assise and witness named in the charter, if the other party simply denied the charter and confirmation, and did not chuse to go on by a *quadruplicatio*, or sur-

(*a*) Bract. from 240 to 242.

rejoinder, and say, that after all which was stated, he had since made another presentation (*a*). The sense of all this pleading was, that the last exercise of right by presentation overbalanced every consideration arising from the right to make that presentation; and so stood the law, conformably with that deference which was universally shewn our old jurisprudence to seisin, or possession, whatever the right to that seisin and possession might be.

It might be excepted, that the complainant had aliened the land to which the advowson was appendant, *cum omnibus pertinentiis*; or that he had not in his hands any part of the freehold to which it was appendant, but had lost it all by judgment or by disseisin: for though he might have a right to the freehold and its appurtenances, he was first to recover that, before he could present (*b*). These and many other matters might be excepted against the assise.

Nothing can better shew the nature of this assise, how far it had effect, and where it failed, than some cases determined in this reign. In one of these it was held, that when it could not be proved who made the last presentation, nor the next before, nor the next before that, the plea should proceed upon the mere right and property, by that same writ of assise, without recurring to any writ of right: a *narratio*, therefore, or count, was immediately to be made of the seisin of an ancestor, and of the right descending to the demandant, as if it had been *ab initio* a suit upon the right; and the tenant might, as he chose, put himself upon the great assise, or defend himself by duel. Another case was this: Suppose a man had an advowson of a church, and being in seisin of the presentation, gave it in marriage, and afterwards, before he made any presentation, the donee gave it again to another, and then the church for the first time became vacant; upon which the donor, the first donee, and the second donee, all presented: in this case, the donor would, in an assise for the presentation, be pre-

(*a*) Bract, 242. b. (*b*) Ibid. 242. b. 243.

ferred to the other two; for the first donee had no true seisin, so as to transfer the advowson to another; nor could the second donee receive what the first could not give him: and so it was determined in more cases than one, that where a person, to whom an advowson was given, conveyed it away before he had presented to it, the conveyance was null, because there was no remedy to give it effect (a).

Of *quare impedit*.

As persons, in the foregoing instances, having presentations, could not go upon any seisin of their own or their ancestors; and in all cases, as those who had by any lawful means acquired a right of presentation, whether by gift or by judgment, for life or in perpetuity, would, if they had not presented before, have been unable to maintain their right in an *assisa ultimæ præsentationis*, or a writ of right of advowson; remedies had been devised some time in this reign by two writs, one called *quare impedit*, the other *quare non permittit*; for so Bracton calls it, though the words of the writ are *quodd permittat*. The difference between these two writs of *quare impedit* and *quare non permittit*, is thus explained by Bracton: *Impedire est ponere PEDEM IN jus alienum, quod quis habet in jure præsentandi*. When a right, whatever it might be, was accompanied not with a proper seisin, but a *quasi seisin*, in such case the remedy was by *quare impedit*. But if the person presenting had not even this *quasi seisin*, but clearly none at all; as where a right of presentation accrued by donation, or by reason of a tenement holden for life, as in dower, or *per legem terræ*; or to a farmer by reason of his farm; to a creditor by reason of a pledge, where no seisin nor *quasi seisin* was had; there, as no one could be said *ponere pedem in jus*, or in a *quasi seisin* (which the person in fact never had), a *quare impedit* would not hold, but recourse must be had to the *quare non permittit*; which purported that the person

(a) Bract. 245. b. 246.

who had the property, or *proprietas*, did not permit him who was in possession to use his *jus possessionis*.

The writ of *quare impedit* was as follows: *Quia A. fecit nos securos de clamore, &c. pone per vadium, &c. ad respondendum eidem A. QUARE IMPEDITE eundem A. præsentare idoneam personam ad ecclesiam de M. cujus ecclesiæ advocationem idem A. nuper in curiâ nostrâ coram justitiariis nostris apud Westmonasterium recuperavit versus eundem B. per judicium curiæ nostræ; unde idem A. queritur quòd prædictus B. injustè et contra coronam nostram, or in contemptum curiæ nostræ eum inde IMPE-DIT: et habeas, &c.* This was the form of the writ of *quare impedit*, which has rather the appearance of a writ of execution, or at least a judicial process to enforce a judgment in some action, than an original writ. The writ of *quare non permittit* was as follows: *Præcipe A. QUOD justè et sine dilatione PERMITTAT B. Quare non per-præsentare idoneam personam ad ecclesiam, &c. quæ vacat, et ad suam spectat donationem, ut dicit; et unde queritur quòd prædictus A. eum injustè impedit. Et nisi fecerit, et idem B. fecerit te securum, &c. tunc summone, &c. quòd sit coram justitiariis nostris, &c. ostensus quare non fecerit, &c.* From the comparing of these writs, it seems, says Bracton, that the *quare impedit* and *quare non permittit* come to the same thing (a); in which observation later times have agreed with him; for the writ of *quare impedit*, which seems to have been very recently introduced, and in a very unfinished state, soon became obsolete (b), and the *quare non permittit* was continued, and is still in use, under the name, however, of *quare impedit*.

The process in this writ was as follows: If the party did not appear to the summons on the first day, nor essoîn

(a) Bract, 247.

(b) Vid. 2 West. 13 Ed. I. c. 5. where a writ of right, of *ultimæ præsentationis*, and *quare impedit*, are mentioned as the only original writs to recover advowsons.

himself, then the old practice (before the Council of Lateran, when no time run in case of vacancy of churches) was to attach the impeder by pledges, and so on by better pledges, and to run through the whole solemnity of the process by attachment: but since that time, the courts had got into the usage of proceeding with more dispatch; in a way, says Bracton, not warranted by law, yet, as he admits, such as was excused by the necessity of the case, which required that a lapse should be prevented, if possible. This was, in the first instance to distrain the impeder, either by directing the sheriff, *quòd habeat corpus ejus*, or *quòd distringat eum per terras et catalla*, *quòd manus non apponat*, or *quòd faciat eum venire*. *Hoc*, says Bracton, *provenit non per judicium, sed per concilium curiæ*, to disappoint and punish the malice of those who hindered presentations in order that lapses might happen (a). It seems this process was warranted by the order of the court merely, and it is spoken of by Bracton as an intrenchment on the regular course of proceeding, that was to be excused by the nature of the case. The legislature at length interposed to authorize this proceeding, and settled it somewhat in the manner it is here stated (b).

If the impeder was within age, and had nothing by which he might be distrained, then the person in whose hands he was, and by whose advice he was directed, was to be summoned: *Ibi habeas B. qui est infra ætatem, et in custodiã tuã, &c. ad respond. &c.*

It was the opinion of some, that the patron only was to be summoned, and not the clerk, because he claimed nothing in the advowson. But in truth, says Bracton, it was first to be seen, whether it was the patron or the clerk that caused the impediment; for both might be impeder at different times; the patron before he lost the presentation by judgment, and the clerk by afterwards insisting on it: and in this case, the clerk was to be summoned as a

(a) Bract. 247. (b) By the Stat. Marl. 52 Hen. III. c. 12. Vid. post.

principal impeder, and the patron only incidentally, to shew what right he could claim in a presentation which he had once lost by judgment of law. If a patron caused a clerk, properly instituted, to be summoned for impeding his presentation, he might answer, that the church was not vacant; which would be tried by the bishop; or he might say, that he claimed nothing in the advowson, nor impeded any one by presenting, but that he himself was already in possession, and therefore that the church was not vacant.

Lest the bishop should put an incumbent into the church *pendente lite*, before the six months elapsed, there used to go an inhibition *ne incumbaret*, or *ne clericum admittet*, &c. so that the bishop could not afterwards admit any one, till the suit depending was determined. If, however, the last presentation was determined in one suit, and another was depending upon the right, the bishop was to admit a clerk presented by him who had the last presentation, notwithstanding the prohibition (a).

When a person recovered seisin by assise of darrein presentment, by *quare impedit*, or *quare non permittit*, there went a writ to the bishop *ad admittendum clericum*, which usually stated the record and judgment in the action. When these writs were occasioned by either of the two last actions, there was a clause inserted, which was left out in that which issued after an assise; and as this shews a remarkable difference between these actions, it may be worth noticing. In the case of a *quare impedit*, and *quare non permittit*, a clause was inserted in this writ, which directs that the clerk should be admitted *non obstante reclamazione talis*, naming the unsuccessful party. Now, as a *quare impedit* and *quare non permittit* were actions between certain parties, who were to abide the judgment given between them, neither ought to resist the execution thereof, and such a clause was very proper. But in an assise of darrein present-

(a) Bract. 247. b. 248.

ment it was otherwise; for though the suit was between certain parties, yet the assise was not only to inquire of their right, but of that of any other persons whatsoever; the writ directing the jurors to recognise generally *quis advocatus, who*, and not whether either of the parties only, made the last presentation; and therefore it would be in vain to say, *non reclamante* the persons named in the writ, when any other person might resist it, if the assise declared for him, though he was not named in the writ (a). When this assise was taken *in modum juratæ*, the issue in such case not being *quis, &c.* but on a collateral fact, then this clause was inserted.

If the clerk of the patron who lost in the assise, instituted any suit against the other clerk in the spiritual court, there went a prohibition to stop it, as we before saw in Henry II.'s reign (b). Should the bishop neglect to obey the writ *ad admittendum clericum*, there issued another of *quare non admisit*; upon which lay the process of attachment: and upon this, inquiry might be made into the reasons and propriety of the delay (c). Thus far of these writs of possession concerning presentations. The writ of right of advowson belongs to another place.

And now we have gone through the remedies the law provided, where a man was disturbed by violence or otherwise from his *own proper* seisin. We are next to speak of the seisin of *another*; the principal of which is, that of an ancestor: in such case, the method in which the next heir might recover, was by *assisa mortis antecessoris*.

Assisa mortis antecessoris. The writ of *mortis antecessoris* preserved now the form it had received in Glanville's time (d), with the single variation of the return, and limitation. The limitation, according to the alteration made by the Stat. Merton, was, *si obiit post ultimum reditum regis Johannis patris nostri de Hiberniâ in*

(a) Bract. 243. b.

(b) Ibid. 250. b. Vide ante, 141.

(c) Ibid. 251. b.

(d) Vide ante, 178.

Angliam; the return was, *coram justitiariis nostris ad primam assisam, cum in partes illas venerint*: though to these variations it may be added, that whereas in Glanville's time it seems to have been only on a father's dying seised, it was now extended further, to the death of a mother, brother, sister, uncle, and aunt (a). These were the degrees within which an assise was limited; for a proper writ of mortauncestor never was allowed so high as the grandfather (though there was a writ *de morte avi*, and *avie*, which Bracton calls partly a mortauncestor, and partly a writ *de consanguinitate*), nor in descent so low as the grandson; no assise being allowed of the death of one or of the other, though a grandson might have an assise of the death of his uncle or aunt, as before said. Again, this assise would not lie *inter conjunctas personas*, as brothers and sisters, grandsons and grand-daughters (b). We shall afterwards see how the writ *de consanguinitate* was framed to supply some of these defects.

In an assise of mortauncestor the process was a re-summmons, in the same manner as was before mentioned in the assise of darrein presentment; and if at length the parties appeared, but the jurors did not, then there was an award, that *ponatur assisa in respectum pro defectu juratorum*; and they were called together again by a *habeas corpora juratorum*, just as was stated in that assise (c). It appears in Glanville's time that the tenant was not to be waited for after the first summons.

When both the demandant and tenant appeared in court, the tenant might call a war-
rantor; a privilege which Glanville does not mention as allowed in this writ; upon which there issued a summons *ad warrantizandum*. If at the day the demandant and tenant appeared, but the warrantor made default, then the assise was taken by the default of the warrantor; nor was any process of distress by caption of his land, or other-

Vouching a
warrantor.

(a) Bract. 254. 261. b. (b) Ibid. (c) Ibid. 255. 255. b. 256.

wise, allowed against the warrantor, till the assise was taken, and it was known whether the tenant lost or retained his land, and so whether he needed any recompence from his warrantor: and even should the assise not be taken on that day for want of jurors, or for any other cause, and the warrantor appeared before it was; yet, notwithstanding, he would not be heard till the assise had first been taken. If the tenant lost by the assise, they proceeded against the warrantor, and distrained by the writ of *CAPE in manum domini regis, &c. de terrâ ipsius A. ad valentiam terræ, &c. quia B. recuperavit versus, &c.* If the warrantor appeared in obedience to this compulsory process, he either entered into the warranty, or pleaded he was not bound to give a recompence in value; for this obligation of his warranty was the only point which he could now deny, it being in vain to say any thing about the other of defending him in his seisin, that being lost by the assise. If he could not defend the recompence in value, he was immediately to make the usual satisfaction to the tenant.

If the warrantor appeared at the first day, he either entered into the warranty, or shewed why he did not. If he entered into the warranty, he might make all the answers and exceptions the tenant might; and he became, in fact, the very tenant; he might call others to warrant him; and if the last warrantor could not deny his warranty, or the assise was taken by his default, he was to give a recompence in value to his feoffee, and that feoffee to his, and so on, to the tenant in the action.

When the warrantor denied that he was bound to warrant, no other penalty, as we said before, was inflicted on the tenant, but that the assise was taken by default; and this was the great difference between the situation of a tenant under these circumstances in an assise of mortaucestor, and in a writ of right: and with reason; for in the assise, the warrantor was only to defend against the assise, by saying something to shew that it ought to re-

main; and if he could not say any thing to that effect, the assise proceeded of course, and the question was only upon the possession: whereas in a suit *de proprietate*, the warrantor was called to answer to the demand, and defend the very right; and he was bound to shew that the demandant had no right; and if he could not do this, there was a judgment, that the land should be lost for want of a defence (a).

When the demandant stated his *intentio*, he was then to establish and prove, by the assise *in modum assisæ*, all the articles of the writ, namely, *quòd talis antecessor*, of whose seisin he claimed, *fuit seisitus in dominico suo, ut de fædo, die quo obiit*, and *post terminum*, &c. which was the limitation in these writs; and if he failed in one of these articles, the assise was as much lost as if he had failed in all (b). To all or some of these the tenant, if he could not call a warrantor, as before stated, might answer and make his exceptions, shewing why the assise should not proceed; and for proof of what he said, was (as in the other assises) to put himself upon the assise *in modum assisæ*, or *in modum juratæ*, according to the nature of the allegation: for this assise, as well as that of novel disseisin, was sometimes turned into a jury, to try the truth of such collateral facts as might be alleged against the assise proceeding. The sort of facts which would occasion this change, and the manner in which it was conducted, it would now be unnecessary to enumerate particularly, after what has been said on the assise of novel disseisin. The writ of *seisinam habere facias* was various, according to the circumstances of the proceeding in court: whether the recovery was by the assise, by judgment, by confession, it was always so mentioned: *Scias, quòd A. &c. recuperavit, &c. per assisam, &c* (c).

We shall therefore conclude what we have Where this writ would lie. to say upon the writ of *mortis antecessoris*, by

(a) Bract. 257. b. to 261.

(b) Ibid. 261. b.

(c) Ibid. 256.

shewing between what *persons* it would hold, and adding a few remarks upon the *instances* where it was not allowed. The reason of confining this writ within certain degrees was an anxiety, lest by extending it further, questions *de proprietate* might be sometimes determined by an assise, which was a proceeding only designed for disputes about the possession. This writ would not lie between *conjunctas personas*, as co-heirs, whether they were parceners, that is, capable of taking an inheritance descending from a common ancestor, or not capable; for if they were co-heirs capable of taking, that is, if the inheritance was partible, as among daughters, or, by particular custom, among the sons; recourse was to be had to the writ *de proparte*; and if, in such case, an assise was brought, it would be lost by the exception of the mere right; as each of them was the *hæres propinquior* to his own share, compared with those in a remoter degree. And again, where they were co-heirs (who were by law considered *quoad seisinam* as *justi et propinqui*), though not parceners, or capable to take, as above supposed, but one of them, to whom the *jus merum* descended, was preferred to the others; yet, even in this case, the assise would not lie, as it only would determine the possession and seisin, respecting which they were considered all equally *justi et propinqui*; but recourse was to be had to the writ of right, which determined both the seisin and the mere right (a).

As this writ would not lie between co-heirs that were legitimate, capable or not capable, so neither would it between legitimate and natural children: for if it was objected to a natural brother that he was a bastard, or a villain, though he should prove himself legitimate and free, he would not thereby prove himself *hæres propinquior*, which must be done before the right could be decided; and there-

(a) *Seisinam et merum jus.*

fore, as that could not be in this assise, they must resort to the writ of right (a).

It had been said by Glanville, that this assise would not lie in burgage tenure (b), on account of a particular law; the effect of which law we may guess at, when we learn from Bracton, that the reason of this was, because many boroughs had a particular custom, which enabled the burgesses to make wills of land; and where that prevailed, it was to no purpose to inquire by this writ, whether the ancestor died seised. He says, that the freemen of London (c) and burgesses of Oxford could make wills of their land, as of a chattel, whether they had such land by purchase or descent. In some places, this custom was confined to land purchased (d).

We have seen, that the assise of mortuor- A writ *de consanguinitate*.
cestor was limited within certain degrees, and lay only against certain persons, on the death of certain persons, beyond which recourse was to be had to a writ of right. To prevent this, in questions of seisin which could be proved *de proprio visu et auditu*, there had lately been contrived, in aid of this assise, the writ *de consanguinitate*, which was to determine questions of possession in such degrees and persons to which the assise did not extend within the time of limitation prescribed to the assise. This writ lay only of such things as the deceased died seised of *in dominico suo, ut de fædo*, and not those he died seised of *ut de mero jure*; it being designed to go only upon the possession, to avoid the hazard of the duel, and of the great assise. As this writ came in the place of the assise, and had for its object the seisin of the ancestor, there was every reason why it should pursue the nature of its original, as nearly as possible. It therefore observed the time of limitation in the old writ, and was confined to the same persons to which that was. Thus, though this writ ex-

(a) Bract. 278. b.

(b) Vid. ant. 182.

(c) *Barones Londini.*

(d) Bract. 272.

ceeded the degrees of the assise, as it extended to the grandfather, great-grandfather, and higher in the ascending line; and in the descending, to the grandson, great-grandson, and lower; it, nevertheless, did not lie between such persons as the assise did not, as between co-heirs and the like; according to the rule, *inter quascunque personas locum habet assisa infra suos limites, inter easdem locum habet consanguinitas*; and *vice versâ* (a). And if the time exceeded the limitation in a writ of *mortis antecessoris*, the writ of consanguinity would not hold; as the demandant could not by possibility, at such a length of time, prove the seisin *de visu et auditu proprio*, but only *alieno*, that is, of the father of the witness, who saw it, and enjoined his son to witness it thereafter; which sort of testimony could only be received in a writ of right (b).

This was the origin and the nature of the writ *de consanguinitate*; the form of which was as follows: *Præcipe A. quòd justè et sine dilatione reddat B. terram, &c. cum pertinentiis in villâ, &c. de quâ C. consanguineus* (or it might be expressed specially, as *avus*, or *nepos*) *ipsius B. cujus hæres ipse est, fuit seisitus in dominico suo, ut de fædo, die quo obiit, ut dicit. Et nisi fecerit, & B. fecerit te securum, &c. tunc, &c. &c.* After the essoins, and both parties appeared in court, the demandant was to propound his *intentio* in this way: *B. petit versus A. tantam terram cum pertinentiis in tali villâ, ut jus suum, et unde talis consanguineus suus, cujus hæres ipse est, fuit seisitus in dominico suo, ut de fædo, die quo obiit; et de ipso tali descendit jus prædictæ terræ cuidam tali filio et hæredi*: and thus he was to deduce the descent, as in a writ of right, down to himself; and then add, *et quòd tale sit jus suum, et quòd talis consanguineus ita fuit seisitus, offert, &c.* he made an offer to prove: to which the tenant answered in this way: *Et A. venit, et defendit jus suum, &c. et dicit, quòd non debet ad hoc breve respondere, quòd, &c.* (c) which scrap of

(a) Bract. 267.

(b) Ibid. 281.

(c) Ibid.

pleading may be noticed, as well for illustrating the action we are now upon, as to give the first instance that occurs of the formal parts of a record: many such will present themselves before we have done with this reign. It must be remembered, that Bracton says, this action was an assise, and might, like others, be occasionally turned into a jury. All those exceptions might be made to it, which lay in the assise of mortaucestor.

It is stated as a question by Bracton, whether this writ could, by means of the *narratio*, or *counting* upon it, be turned into a writ of right, as a writ of entry might: as for instance, if the demandant in a writ *de consanguinitate*, in counting his descent, *et unde talis consanguineus suus obiit seisitus in dominico suo, ut de fædo*, should then add, *et de jure*; this, Bracton says, would be going from the possession to the *proprietas*: for in saying, *talis obiit seisitus in dominico suo, ut de fædo*, the *jus possessionis* only was brought in question; and when he adds *de jure*, he brings likewise in judgment the *jus proprietatis*, which made the *jus duplicatum*, or *droit droit* (a). But as the writ *de consanguinitate* was, in its nature, only a possessory remedy, the demandant, by counting of the mere right, would go beyond the design of it; and therefore the writ would be destroyed, and the party have no remedy left but the writ of right. Again, by the same reason, a writ of right could not, by the way of counting, be turned into a writ *de consanguinitate*; as a person who had once commenced a suit upon the right, with effect, could never go back to an action upon the possession only. But a writ of entry, as it was *in jure proprietatis*, might sometimes become a writ of right, on account of the entry being too ancient to be proved *proprio visu et auditu*: and again, a writ of right might become a writ of entry, when the entry could be

(a) Vid. ant. 320.

proved *proprio visu et auditu*. But of this we shall have occasion to say more hereafter (a).

An assise of *mortauncestor* did not lie for a right of common, of the seisin of an ancestor; in lieu of it, therefore, a writ of *quòd permittat* had been formed: *Quòd permittat. Præcipe, &c. quòd, &c. PERMITTAT talem habere communiam pasturæ, &c. de quâ talis pater, or avunculus, or consanguineus, cujus hæres ipse est, fuit seistus de fædo tanquam pertinente, &c.* And in like manner for a successor: *Præcipe, &c. quòd, &c. permittat A. rectorem talis ecclesiæ, &c.* These two writs were possessory, as well as the former; and the mere right could not be discussed in them (b). They were likewise always determined by a jury, and not in the way of an assise.

There was a writ which partook of the nature of an assise of *mortis antecessoris* and of novel disseisin, to summon a person *ostendendum quo warranto se teneat in tantâ terrâ, &c. quam A. pater ipsius B. recuperavit versus eundem C. &c. et de quâ fuit seistus ut de fædo, die quo obiit, &c.* The like in case of a common (c).

It was not the practice to allow damages to be recovered in an assise of *mortauncestor*; which Bracton laments as an encouragement to chief lords to commit waste and destruction on lands which they seized at the juncture of a tenant's death. We have before seen, that a chief lord was more commonly an object of this assise than persons of any other description (d).

Assisa utrùm. The next and last remaining assise was the *assisa utrùm*, to try whether a fee was lay or ecclesiastic (e). But before we enter upon this, let us turn back for a while, and review these assises, in the first mention of them by Glanville, and as they were now treated by Bracton. This proceeding was in Glanville's time called

(a) Bract. 283. b. 284.

(b) Ibid. 284. 284. b.

(c) Ibid. 285.

(d) Vid. ant. 178.

(e) Vid. ant. 186.

recognitio; and, in speaking of the remedies upon seisin, he enumerates the recognitions then in use in the following way. There were, says he, the recognition *de morte antecessoris*; that, *de ultimâ præsentatione*; that, *utrùm aliquod tenementum sit fædum ecclesiasticum vel laicum*; that, *utrùm aliquis fuerit seisitus de aliquo libero tenemento die quâ obiit, ut de fædo, vel ut de vadio*: that, *utrùm aliquis sit infra ætatem vel plenam habuerit ætatem*; that, *utrùm aliquis obierit seisitus de aliquo libero tenemento, ut de fædo, vel ut de wardâ*; that, *utrùm aliquis præsentaverit ultimam personam ad ecclesiam, occasione fædi vel wardæ*. These he speaks of by name; and then adds, "and if any similar questions (as many might) arise in court during the presence of the parties, it was often awarded, as well by consent of parties as by the advice of the court, to decide the controversy by a recognition:" and then he mentions the recognition *de novâ disseisinâ* (a).

Thus did Glanville consider, not only all those above specified, but all possible recognitions had by consent of parties upon the same footing, of the same nature, and attended with the same legal consequences: as they were all *recognitions*, so were they all *assises*; those terms being, at that time, convertible. We have before observed, that a recognition taken by consent of parties was afterwards called a *jurata*, and that a distinction arose between an assise and a jury. In consequence of this, many of the issues which in Glanville's time were tried by an *assise*, were now tried by a *jury*; and of all those assises enumerated by him, there remained at the time of which we are writing, only that of *novel disseisin*, *ultimæ præsentationis*, *mortis antecessoris*, and this *assisa utrùm*. The first three of these survived, no doubt, because they were remedies by which property might be recovered, being attended with compulsory writs of execution and the like; and therefore, as they

(a) Glanv. lib. 13. c. 2. Vide ante, 148.

were continued for the same purposes for which they were framed, they retained their original appellation, with their original use; while the others, being to try issues which were of little importance, except when connected with some principal question of right, and which now might be tried by a jury, or by the assise in the cause turned into a jury, went out of practice as original assises, if indeed they ever had been such. And it is to be wondered, how the *assisa utrùm* escaped the same fate; having nothing in it like an original commencement of a suit, but seeming to be rather calculated for the trial of an incidental question, not of importance except as it was involved in some other.

In later times, those who wanted to account for these actions being denominated assises, have usually said that they were called so, because the jurors were summoned in the first instance by the original writ; which did not happen in any other action. How far this might be, strictly speaking, a reason for the appellation, after what has here been said of the history of assises and juries, the reader may form some judgment.

To return to the *assisa utrùm*. This assise is said by Bracton to have *multum possessionis et juris*, which is more than could be said of any other, as it determined both the possession and the right; for there could be no question raised about the right after this assise, though the person who had *more* right might, notwithstanding, contest his claim upon the *merum jus*. In this assise, recognition was to be made, whether the tenement in question was the lay fee of the tenant, or was held *in liberâ eleemosynâ*, belonging to some church. This assise, says Bracton, might be brought either by a layman or clerk; and so the practice had been established in the time of the famous justice *Pateshull*; though he afterwards himself altered his opinion, and held it would only lie in the person of a rector. But in the time of Bracton, they returned to the practice first established by *Pate-*

shull, and it was held good both for clergy and lay. This writ belonged only to rectors of parish-churches, and not to vicars.

The writ in this assise was much the same as in Glanville's time; only it was returnable before the justices *ad primam assisam*. In this assise, the tenant, whether clerk or lay, might vouch to warranty, as in the assise of *mortis antecessoris*. This assise would not lie of land given to cathedral and conventual churches, though given in *liberam puram, et perpetuam eleemosynam*; the reason was, because the gift was not to the church solely, but also to a person, to be held as a barony; as, *Deo et ecclesiæ tali, et priori, et monachis ibidem Deo servientibus, or episcopo tali, &c.*: and therefore such persons might have all those remedies which laymen might, as writs of novel disseisin, of entry, and of right; and consequently were not to avail themselves of a remedy devised merely for a parson claiming land in right of his church, and who could claim no otherwise: for in cases of parochial churches, gifts were considered not as made to the parson, but to the church. This assise, like others, might be turned into a jury: and it may be noted here, that in all assises, when the assise passed in *modum assisæ*, the entry on the roll was, *assisa venit recognitura, &c.*; when in *modum juratæ*, the entry was conformably, *jurata venit recognitura, &c.*

It may be observed, that, besides this assise, a parson might have many remedies to which laymen were entitled. He might have an assise of novel disseisin, and a writ of entry; an assise of mortdauncestor, from the nature of the parson's estate, could not be brought by him. If a writ of right was brought against a parson, he might, like another person, vouch to warranty, and then the suit would go on between the demandant and the warrantor to the duel, or the great assise. But if he had no warrantor, and had some one who could testify *de proprio visu et auditu*,

then, says Bracton, he might put himself upon a jury to try, *utrùm terra petita sit libera eleemosyna, &c. an laicum fædum, &c.* as if a layman had originally brought the *assisa utrùm*; which is a very happy and pointed instance of the remark we made before, concerning the issues, formerly triable by assises, being devolved on juries. If he chose to defend himself by the duel, or great assise, for want of some witness *de proprio visu et auditu*; he might do it from the necessity of the case, provided he had licence from the ordinary, and the concurrence of his patron. If land fell to his church by escheat, there was a writ for the rector to recover it: *Præcipe quòd, &c. reddat tali rectori, &c. quam clamat esse jus ecclesiæ, et quæ, &c. reverti debet, tanquam eschæta.*

As this assise determined the right as well as the seisin, it was made a question by some, whether a conviction would lie against the jurors; and Bracton was clear, from some determinations in this reign, that it would, if the assise was taken *in modum assisæ*, and if the writ of conviction was prayed before a long interval had passed from the taking of the assise. A conviction had been denied, where sixteen years had elapsed (a).

As we have gone through all the assises now Of conviction. in use, it follows, that something should be said on the *conviction*, or *attaint*, as it was called in later times, for perjury; to which the recognitors were liable, if they swore falsely. This is treated very shortly by Glanville, who only mentions the punishment; and from the passage where he speaks of it, one might be led to think it belonged only to the great assise (b). We shall find, that, on the contrary, though in Glanville's time it might lie in the great assise as well as others, yet now it lay in all others, but not in the great assise.

When, therefore, the jurors in any of the foregoing assises had sworn falsely, and so committed perjury, they

(a) Bract. from 285. b. to 288.

(b) Vid. ant. 107.

might be convicted of that perjury by the person who had lost by the assise. And that might be effected several ways; either by the oaths of twenty-four other jurors; or out of their own mouths by the examination of the judge, without recourse to the jury of twenty-four; or by their own free confession, in which they acknowledged their offence, and put themselves on the king's mercy; and in these different cases, the penalty was accordingly different.

If they were to be convicted by another jury, it was first to be seen, how many jurors were in the assise (for they were not always the same number); each juror was to have at least two to convict him: and the jurors on the conviction were to be at least of as good condition, if not better, than those on the assise.

When it was in agitation to proceed to conviction in this manner, it was first to be considered who was in fault, whether the judge or the jurors; for which purpose the record was in the first place to be inspected: for if the judge should not have diligently made that examination which it was his duty to do, he himself might have negligently left occasion of perjury to the jurors; and thus both would be in fault; perhaps it might lie with one of them only. By the record it would also appear, whether the assise was taken *in modum assisæ*, or *in modum juratæ*. If in the former way, the jurors were to try whether the verdict was *true* or *false*: if it was true, then it remained in force; if false, the jurors were to be punished for their false swearing. According to Bracton, a distinction was made between a verdict that was *falsum*, and one which was called *fatuum*: as for instance, if they gave their verdict generally, and it was not true, then it was what they properly called *falsum*; but if they gave a reason together with their verdict, and it was not true, this was called *veredictum fatuum*; being only a wrong conclusion of the jurors; and so rather a false reasoning, than a false swearing. The judge might sometimes go contrary to the

verdict of the jurors, when they spoke the truth, and gave their reason for so doing. If, in such case, he knowingly deviated therefrom, the fault lay with him.

If, upon view of the record, it appeared that the jurors, having declared themselves obscurely, had not been properly and diligently examined by him, or had answered his interrogatories not fully, or doubtfully; or seemed to have been misled by some mistake; or to have spoken the truth only in part; in such cases, the remedy was by *certificate*, and not by conviction; the certificate being a proceeding whose object was to render certain and true, that which was before dubious, erroneous, and uncertain: of this we shall say more hereafter.

In order to the conviction, as we before said, it must first be seen, whether the assise was taken in *modum assisæ*, or in *modum juratæ*. When the complainant or demandant propounded his *intentio*, and maintained all the articles of the writ; and the tenant excepted to both, by denying them in part, or in the whole; the complainant was then to prove them by the assise: and as this was in *modum assisæ*, a conviction would lie. But where the exception was of such a kind, that, admitting both the matter of the writ, and the *intentio*, yet it destroyed the action, as a covenant, or the like; then the assise was taken, as has been often before mentioned, in *modum juratæ*, and the conviction would not lie. Yet if the assise was taken in the absence of the tenant, and they found such matter as would have been good subject of exception to the action; as a covenant for instance, or the like; then the assise being taken in *modum assisæ*, a conviction would lie (a).

A conviction, as we before said, lay in all assises, except the great assise; and the reason given by Bracton why it did not lie there, is, because, when the tenant had the choice between the duel and the assise, and he had volun-

(a) Bract. 288. b. 289, 290.

tarily betaken himself to the latter, he should not be allowed to reject their determination, any more than when a person had chosen to put himself on a jury (*a*); and therefore a conviction which was with a view to overthrow and question such determination, was denied in both cases. However, there was an exception in favour of the king; for when a jury had found any thing against the king, Bracton says, that there might, in some cases, be a conviction. There was no conviction for damages, but the remedy in case of excessive damages was by *certificate*. The same persons who brought an assise, or against whom it was brought, might have a conviction; and it was, in general, to be heard before the judge who tried the assise, he being best able to judge of the truth thereof (*b*). The authority to take an assise was thought *eo nomine* to carry with it that of taking convictions and certificates, without which an assise might sometimes not be completely taken; therefore it was, that a conviction was to be *statim et recenter* after the caption of the assise; and it could not be had at a distance of time but by the special command of the king (*c*).

The writ of conviction was to the following effect: *Si A. fecerit, &c. tunc summoneas, &c. 24 legales milites de vicineto de villâ, &c. quòd sint coram justitiariis nostris ad primam assisam. &c. recognoscere si talis, &c. disseisivit, &c.* as in the writ of assise; *unde A. queritur, quòd juratores assisæ novæ disseisinæ quæ inde summonita fuit & captâ inter eos coram justitiariis nostris ultimo itinerantibus in comitatu, &c. falsum fecerunt sacramentum. Et interim diligenter inquiras, qui fuerunt juratores illius assisæ, et eos habeas ad præf. assisam coram præf. &c. Et summoneas B. quòd sit, &c. auditurus illam recognitionem, &c.* (*d*) If nothing could be objected against this inquiry when the jury appeared, they were sworn, not as

(*a*) Vid. ant. 335.(*b*) Bract. 290. b.(*c*) Ibid. 291.(*d*) Ibid.

an assise, but as other juries: "Hear this, ye justices, " that I will speak of that which you require of me, on " the part of our lord the king," &c. Then the judge proceeded to charge the jurors, as in other cases. The entry upon the roll was thus: *Jurata viginti quatuor ad convincendum 12 venit recognitura, si A. injustè et sine judicio, &c.* according to the form of the writ; and then the *narratio* followed: *Et unde talis queritur, quòd juratores talis assisæ captæ coram justitiariis, &c. falsum inde fecerunt sacramentum, eò quòd dixerunt quòd prædictus talis disseisivit talem injustè, &c.* and so on through the *narratio* and *exception*, if any (*a*). Upon this writ of conviction it may be remarked, as a reason why it should not lie, when the assise was taken *in modum juratæ*, that the form of the original writ in the assise was so inserted, as to confine the enquiry to the articles of that writ (*b*); whereas the point tried by the assise *in modum juratæ* was, generally, something collateral to the writ, which arose upon the pleading.

As these twenty-four could not be convicted if they spoke falsely, and as the consequences of a conviction would be very penal to the twelve; great care was taken to examine the jurors diligently as to all the circumstances upon which they meant to proceed. If there was a difference of opinion amongst them, they might be afforded like the assise. If they were still doubtful, or declared plainly that they knew nothing of the matter, things were left to remain as they were. If they confirmed what the twelve had done, the judgment was entered thus: *Consideratum est, quòd 12 juratores benè juraverunt, et quòd tenens remaneat in seisinâ, et querens custodiatur*, to be redeemed by some heavy pecuniary penalty. If they found against them, the entry was, *Consideratum est, quòd prædicti 12 juratores*

(*a*) Bract. 292.

(*b*) Ibid. 291. b.

malè juraverint, et quòd querens recuperet seisinam suam, et elle tenens in misericordiâ, et juratores (if they were present) *custodiantur*, if not *capiantur*. If the twelve had not been unanimous in their verdict, the twenty-four might convict those who were on the wrong side, and acquit the others (a). After the verdict of the twenty-four, there issued writs of execution, either to confirm the former seisin, or to alter it (b).

The punishment of the convicted jurors, though in substance the same, is more particularly stated by Bracton than by Glanville (c). They were to be thrown into prison; their lands and goods were to be taken into the king's hands, till they were ransomed at the king's pleasure; they were to be branded with perpetual infamy; to lose the *legem terræ*, so as never more to be received as jurors (being, as they then called it, no longer *othesworth*), nor witnesses. A difference was made between the offence of jurors; for those who swore *salvo visu*, not having made it; those who were added to the assise at the time of taking it, who could not possibly have made it; those who, soon after the taking of the assise, had signified a wish to amend what they had done, and put themselves on the king's mercy (d); all such were not to be branded with infamy, though they were to suffer the other part of the judgment.

This was the manner of proceeding, if there was no exception offered to the conviction. The exceptions that might be offered were many. One was, if the person who recovered in the assise had not had seisin according to the verdict; another was, if the person serving the conviction had made a disseisin of the identical land in question. It seems, that a conviction was often prosecuted not out of any hopes of convicting the twelve, and recovering seisin,

(a) Bract. 292. b.

(b) Ibid. 292. b. 293.

(c) Vid. ant. 131.

(d) Bract. 292. b.

but merely to extinguish, or at least defer payment of, the *misericordia* due in the assise (*a*).

Of certificates. Having said thus much of *convictions*, it remains to shew what was the nature of a *certificate*; which was the other method of re-considering the decision of the jurors in assise, and which was sometimes an introduction to the former. The writ to summon jurors *ad certificandum* was of the following import: *Præcipimus tibi, quòd habeas coram justitiariis, &c. corpora A. B. C. &c. recognitorum novæ disseisinæ summonitæ, et captæ coram, &c. ad CERTIFICANDUM præfatos justitios nostros, &c. de sacramento quod inde fecerunt. Et interim prædictum tenementum in manum nostrum cape, &c. Præcipimus etiam quòd habeas, &c. corpus talis ad audiendum inde considerationem curiæ, &c.* A certificate was sometimes had in order the better to understand the record in assise; and after that, it might be thought proper to resort to a conviction. If the twenty-four were doubtful or obscure in delivering their verdict, there might also, after all, be a certificate of their record (*b*). A conviction might be brought by the heir, if the ancestor died after the caption of the assise (*c*).

We have before taken notice of the lenity shewn to such jurors as wished to amend the false verdict they had once given. This had the effect of taking off some of the consequence of their perjury. To this it may be added, that the jurors, of right, might change their verdict before judgment was given; but afterwards, the only remedy was to proceed against them in a conviction (*d*).

Of different trials. As we have now done with assises, and are proceeding to such actions as were triable by jury, and otherwise; it may be proper, before we enter upon this part of our subject, to say a few words on the different trials now in use; which, though apparently very

(*a*) Bract, 292. b. (*b*) Ibid. 293. b. 294. (*c*) Ibid. (*d*) Ibid. 296.

similar, were so essentially distinguished, as to make it necessary to attend to each of them with accuracy.

It must be observed, that there were *assises*, of which enough has already been said; *juries*; *inquisitions*, or *enquests*; and *purgations*; as when a crime was imputed to any one, a purgation amounted to a proof of his innocence. Besides these, says Bracton, there was a defence or denial opposed to a presumption raised, which depended neither on a jury, nor an inquisition, nor a purgation; but it was when a person averred something, *et inde producit sectam*; upon which there followed a defence *contra sectam*, or a *quasi*-proof opposed to the presumption raised by the *secta*. Such defence against a *secta* was called a defence *per legem*; and consisted sometimes of a greater number of persons, and sometimes of less, in different cases. We have before seen the regulation which had been made by *Magna Charta* upon this head (*a*). What was the nature of this *secta*, and of this defence or denial, with the instances in which they were both recurred to, will be seen more particularly in the sequel (*b*). For the present, let it suffice to say, that in all cases of obligations, contracts, and stipulations, arising from the voluntary consent and engagements of men, as in covenants, promises, gifts, sales, and the like, where a *secta* was produced, which, upon examination, induced a presumption only, he against whom the complaint was made, might defend himself *per legem*; that is, he might produce double the number of persons which had been in the *secta*, to swear for him: for when they exceeded the *secta* in number, they induced a stronger presumption; and the stronger presumption always overbalanced the less. But if the complainant had a proof (for it must be observed, that the *secta* was only a presumption, not a proof), as instruments and sealed charters, there could be no defence *per legem* opposed to such proofs. If, therefore, the instru-

(*a*) Vid. ant. 248.

(*b*) Bract. 290. b.

ment was denied, the credit of it was to be proved *per patriam, et per testes*; it being a common issue for a person to put himself *super patriam, et testes in carta nominatos* (a). Again, a person was not allowed this defence *per legem* in cases of evident and notorious trespass.

Dower unde nihil. We shall now begin to speak of such actions as were triable in one or other of these ways. The action of dower *unde nihil habet*, and the writ *de recto* of dower, were the two remedies still in use to recover dower, and seem to be considered by Bracton exactly in the same light in which they are placed by Glanville. The method of conducting them is more minutely described by Bracton, who also makes observations concerning them, which are well worthy of notice.

The writ *unde nihil* was said to be brought in the king's court originally, and there only, because, should a question arise, whether the demandant was lawfully married, no one could write to the bishop to try the marriage, but the king or his justices. The writ *unde nihil* was at this time made returnable, sometimes *coram justitiariis nostris apud Westmonasterium*; sometimes *coram justitiariis nostris ad primam assisam, cum in partes illas venerint* (b). If the party summoned did not come at the appointed day, nor essoin himself, the land was taken into the king's hands, as in defaults in a writ of right; and if he essoined himself at the first day, and, another being appointed, he made default, then also his land was taken: so that, in both cases, whether the default was before appearance or after, the woman recovered her dower by default, either by the *magnum cape* or *parvum cape* (c).

When the parties appeared in court, the widow was to propound her *intentio*, in person, or by attorney, to this effect: *Hoc vobis ostendit B. quæ fuit uxor C. &c.* recit-

(a) Bract. 315. b.

(b) Ibid. 296. b.

(c) Ibid. The distinction between the *magnum* and *parvum cape* will be explained when we come to speak more particularly of process.

ing her title to dower, in pursuance of the words of the writ, concluding it thus : *Et si hoc cognoscere voluerit, hoc gratum erit ei; et si non, habet sufficientem disrationationem*; or, what was the same, and indeed the more common form, *et inde producit sectam sufficientem*. When the demandant had thus exhibited her *intentio*, the tenant might demand a view, by saying, *Peto visum*; and after the essoins and delays attending that, he might vouch to warranty, or answer in person, as he pleased (a).

If the tenant had no exception to the writ, then he might, in the next place, call upon the demandant to produce her warrantor, as was the practice in Glanville's time; it being a rule, that no one should answer a woman concerning her dower, unless she brought her warrantor to shew what right he had to the other two parts; and again, that no woman should answer without her warrantor. And therefore it should seem, says Bracton, that as the son of a felon could have no right in the two parts, the widow of such felon could not make out her claim to dower in the other third; nor could she come upon the chief lord, who held it as an escheat, *pro defectu hæredis*; which was not the case where he took the escheat on account of the last possessor being a bastard, and so not having any heirs, for then he came in, as to the purpose of dower, *loco hæredis*; and the widow could claim her dower against him. The same might be said of an assignee of the fee, who being *in loco hæredis*, dower might be claimed against him (b).

After this the tenant might vouch *his* warrantor; and if he did so, and the warrantor did not appear to the writ of *sum. ad warrant.* nor essein himself, so much of his land was taken as was equivalent to the third part, by a *cape*; and if he did appear after this distress (for it was no more), the widow recovered her seisin of that, and he had his remedy against the warrantor, whom he vouched (c).

(a) Bract. 297.

(b) Ibid. 297. b.

(c) Ibid. 299. b. 300.

If no warrantor was vouched, and the tenant meant to answer to the action himself, he might advance, by way of exception to the action, such matter as would entirely defeat the claim of dower. One great exception to this action was, that the demandant and deceased were not *legitimo matrimonio copulata*, or *ne unque accouples in loyal matrimonie*, as it was afterwards called. In this case, a writ issued to the bishop, commanding him to try such question, as a matter properly belonging to his cognizance. Upon this, the bishop summoned the tenant to appear, and then proceeded to hear the witnesses produced by the widow and him; and so making an inquisition in a summary way, he reported whether the marriage was lawful or not. When it appeared to the king or his justices, by the bishop's letters, that the marriage was good, then there issued, at the instance of the demandant, a re- summons to the tenant (a). If he made default, his land was taken by a *parvum cape*; to which if he made no appearance, seisin of dower was adjudged to the demandant.

If the tenant admitted that the demandant was espoused, but pleaded that she was not endowed; or, that she was espoused and endowed, but not *ad ostium ecclesiæ*; such issues were to be tried in the king's court, and not in *foro ecclesiastico*; for it would have been as improper to transmit these to the ecclesiastical judge to be tried, as the special issue, whether a person born before marriage was legitimate. In this case, therefore, a writ of enquiry went to the sheriff to make inquisition of the fact *in pleno comitatu* (b): for though the marriage was, in such case, good, as far as concerned the legitimacy of the issue, it was not, so as to give title to dower (c).

Suppose all the above circumstances were admitted, and the tenant said that the dower was given in a different manner than stated in the *intentio* of the demandant; as that

(a) Bract. 302, 303.

(b) Ibid. 303. b.

(c) Ibid. 304.

it was not given in any particular land by name, but only the third part generally; how was this to be proved? In the first place, it became the widow to prove her *intentio*, and what she had there averred, *per audientes et videntes*, who were present at the espousals, and who were ready to confirm by oath what she said. If these were examined, and they agreed in what they said, this proof was abided by, unless the tenant had some stronger evidence to prove the contrary. Suppose the widow had no proof, nor sufficient *secta*, nor even an instrument to support what she had declared; then judgment was to be for the tenant, though he had neither proof nor presumption for him, because he was already in possession: yet if the widow had a sufficient *secta*, and the tenant only his own voice, he was not to be heard, though he was ready to put himself *super patriam*, but the widow immediately recovered by force of the *secta*.

Again, if the witnesses (that is, the *secta*) were produced on both sides, and those on one side declared their ignorance of the matter, while the others maintained the point for which they were produced; judgment was given for that side, as the one where the truth of the matter lay. It was indispensably necessary, that the widow should produce a *secta*, or her demand would be totally void; and if the witnesses produced proved nothing, or acknowledged that they were not present at the espousals, or knew nothing of the dower or endowment, then the claim was lost for want of proof, and judgment was for the tenant, *quòd quietus recedat*.

If neither side had any proof, nor could raise a presumption by a *secta*, and both, in the words of Bracton, *de veritate ponunt se SUPER PATRIAM, pro defectu sectæ, vel alterius probationis, quam ad manum non habuerint*; then there issued a writ of *venire facias* to the sheriff in this form (a):

(a) Bract, 304.

tam ex ipsis, quàm ex aliis de proximo vicineto, &c. venire facias coram justitiariis, &c. duodecim liberos, &c. ad recognoscendum, &c. si prædictus A. die quo ipsam B. desponsavit, dotavit eam nominatim de tali manerio, &c. vel si dotavit eam de tertiâ parte omnium terrarum, &c. ut idem D. dicit, quia tam prædicti B. quàm prædictus D. posuerunt se, &c. (a) It may be here observed, that the issue, whether endowed *ad ostium ecclesiæ*, was tried on a writ of inquiry before the sheriff *in pleno comitatu*; but the issue, whether special or general endowment, was to be tried before the justices at Westminster; as was also the issue, whether endowed *ex assensu patris*, or not (b). Again, the issues, whether the husband was so seised as to be able to endow (c), and whether the widow had received any part of her dower (d), were tried on a writ of inquiry before the sheriff. The reason of these distinctions is not easily discovered; and perhaps either of such writs were had at the election of the parties. The election of the parties seems to have directed not only in these cases, but also in the return of original writs, which, we have seen, were sometimes *coram justitiariis* at Westminster, and sometimes *ad primam assisam*, without any apparent reason for such a variety. They were sometimes made in the alternative, and were returnable at Westminster, *NISI justitiiarii PRIUS venerint ad assisam, &c.*

In consequence of the statute of Merton (e), widows were to recover damages; and therefore, when they were to be put into possession, the writ of seisin had one of the following clauses inserted therein. After *seisinam habere facias*, they added, *et similiter ei sine dilatione habere facias tot marcas quæ ei in eâdem curiâ nostrâ adjudicatæ sunt pro damnis suis, quæ habuit pro injustâ detentione, quam*

(a) Bract. 304.

(b) Ibid. 305. b.

(c) Ibid. 309.

(d) Ibid. 312.

(e) Ch. 1. Vide ant. 261.

prædictus ei fecit de prædictâ terrâ, et dote suâ; or in this way, et de terris et catallis prædicti B. fieri facias tot denarios, et illos sine dilatione haberi facias, &c.

Thus far of the writ of dower *unde nihil, &c.* Writ of right commonly called *the writ of dower*. If a person did not recover by this writ all she was intitled to for dower, recourse was then to be had to the writ of right of dower; which was a writ *close*, as they called it, because directed to the warrantor of the widow where the plea was to be heard; where it remained till that court was proved *de recto defecisse*; when it might be removed into the county court, and so to the superior court, as other writs of right.

The *intentio* upon this writ was different in the two cases, of the widow having never been in seisin of the land in question, and of having been disseised by the tenant. The conclusion in the former case was, *et unde idem, &c. fuit seisitus, &c. ita quòd me inde dotare potuit. Et si hoc vellet cognoscere, &c.* as before in the writ of *unde nihil. Et si noluerit, habeo sufficientem sectam*. In the latter the conclusion was, *talis me injustè et sine judicio disseisivit, et quòd ita fui inde dotata, et seisata habeo sufficientem disrationationem, videlicet, talem sectam, et talem*. Thus this differed from the common writ of right, which concluded by offering to deraign the matter *per corpus talis hominis*. Indeed, it widely differed from that writ in both the above instances in which it was applied; a writ of right of dower was for the recovery of a life estate; and the latter form of it was grounded upon a disseisin in the very words of the writ of novel disseisin: and accordingly, in this action there was neither the great assise nor the duel, nor, consequently, the essoin *de malo lecti*; all which were only in the proper writ of right.

When the *intentio* was thus stated, and the tenant did not chuse to call a warrantor, he might except to the action

in various ways, and conclude his exception by *et inde producit sectam*, if he had any; and, if there was occasion, by *ponit se super patriam*; in which last case the truth would be inquired of by the country. When recourse was thus had to the country, in a plea depending in the county-court, by the tenant putting himself on the inquest, and the demandant so likewise, Bracton says, some might doubt, whether that court had power to proceed to take the inquest, without some special authority; but he thinks the sheriff had that and every other authority by force of the words in the original writ, *nisi, &c. hoc fecerit, tunc vicecomes hoc faciat, &c.* and as in other writs of right he might proceed to take the duel, and in writs of *justicies* to try by jury, so he might take the inquest in this writ (*a*). The reason of the above doubt does not seem easy to be accounted for.

In Glanville there is no mention of admeasurement of dower, but where the land all lay in one county. It had now become the practice, where the land lay in several counties, for the admeasurement to proceed in the king's court; and for all the lands to be extended and valued, as well the two-thirds as the third claimed in dower, and for such extent and valuation to be transmitted to the justices. Where the land lay only in one county, the old writ was directed to the sheriff; upon which there was the process of *cape*, in case of default; and the complainant stated his *intentio*, with an *inde producit sectam*; to which there were exceptions, and the matter was at length tried as in other actions (*b*).

Of waste. As a woman had not, what they called, the *proprietas*, but only the use and enjoyment of the land for her life, she was not to commit waste, destruction, or exile upon the freehold; and therefore, in taking such reasonable estover as was allowed her in the woods, for the purposes of

(*a*) Bract. 313. b.

(*b*) Ibid. 314, 315.

building, firing, and inclosure, she was to be careful not to exceed such liberty : and if she did not listen to the remonstrance of the heir, or person who had right, there might issue a writ of *quòd non permittat* to the sheriff; being a sort of injunction, or prohibition, not to permit the widow *quòd faciat vastum de terris quas tenet in dote, &c. ad exhæredationem ipsius, &c.* And if she did not obey the injunction communicated to her by the sheriff, she was attached by a writ : *Pone per vadium & salvos plegios, &c. quòd sit coram nobis vel justitiariis nostris, &c. ostensura quare fecit vastum, &c. contra prohibitionem nostram, &c.* And if she did not appear at the day, the regular process of attachment would issue, with a permission, if she pleased, to have one essoin *de malo veniendi* after the first attachment; after which, and the appearance of both parties, the complainant stated his *intentio*, the same as in other actions. *Talis queritur, ut amicus talis, quòd cùm talis mulier teneat in villâ, &c. tantam terram nomine dotis, tale fecit vastum, et talem destructionem, &c. boscum et servos vendidit, gardinum extirpavit, &c. ad exhæredationem talis hæredis ad valentiam tanti, et inde producit scctam, &c.* This was the nature of the *intentio*. To this the widow might answer as follows : *Et talis mulier venit, et defendit vastum, venditionem, et exilium contra talem, et sectam suam : et quòd nihil inde vendidit, nec aliquid tale fecit ad exhæredationem talis hæredis, &c.* She might acknowledge, *quòd domus vetustate corruerit, &c.* and *si de bosco cepit aliquid, non cepit ibi nisi rationabile estoverium, &c.* and then conclude, *et quòd nihil ampliùs cepit, nec alio modo, ponit se super patriam :* for she could not defend herself *per legem*, says Bracton, because when an injury was done to any corporeal thing, which was manifest to the view of every body, a person was not permitted to deny it in that way, lest the oath of his *secta* might go to prove the contrary of that which was evident to every body's senses; and therefore he recommends, that in this action there should always be a

regular view; and then the damage also might be ascertained with some exactness (a).

If a woman was convicted, by verdict, of making waste and destruction in woods, the penalty to be inflicted on her was, that she should in future be so restrained, as not to be permitted to take even her reasonable estover but by the view of the foresters of the heir: and in some cases, the court would appoint a forester; for which purpose a writ had been framed, and is to be seen in Bracton (b).

Waste might be committed, not only by a tenant in dower, but by a tenant for life, and by a guardian. If a tenant for life exceeded the measure prescribed to a reasonable estover, he went beyond what he was entitled to; and so far encroached upon the *proprietas*; and was, therefore, guilty of waste, unless the waste was too small to be worth an inquisition. Of what magnitude it ought to be, to become an object of judicial inquiry, depended, says Bracton, upon the custom of particular places (c). A guardian committing waste was to lose the custody of the land (d), to make amends in damages, and be *in misericordia regis*; which was different from the penalty on a tenant in dower. In case of waste by a guardian, they proceeded as before stated of waste committed by a tenant in dower; by a writ of *quòd non permittat*; and after that by attachment (e).

Of these terms, *waste*, *destruction*, and *exile*, the two first signified the same thing; but *exilium* meant something of a more enormous nature; as spoiling the capital messuage; prostrating or selling houses; prostrating and extirpating trees in an orchard, or avenue, or about any house: all these were considered, says Bracton, *ad maximam deformitatem*; and as they either drove the inhabitants away, or had a tendency so to do, they were called *exilium* (f).

(a) Bract. 315. b. 316. (b) Ibid. (c) Ibid. 316. b. (d) Vid. ant. 236. (e) Bract. 317. (f) Ibid. 316. b.

If the heir aliened the two-thirds of the land, and attorned the service of the dowress; and if he afterwards, on the death of the tenant in dower, intruded himself, or if any stranger did so, the vendee might have a writ of entry, grounded upon such intrusion (a).

We shall now treat more fully of writs of entry, which have been so often alluded to in the foregoing pages. Of writs of entry. As questions of possession were determined by assises and recognitions, questions *de proprietate* were decided, says Bracton, in writs of entry by a jury, upon the testimony and proof of those who could prove the case *de visus suo proprio et auditu*. This was, where any one claimed his own proper seisin, or that of his ancestor, which seisin he had demised to some one for term of years, or for life, and which, of course, after that term, should revert to him; in which case, he could not have an assise of novel disseisin to recover it, because he had not suffered a disseisin; nor an assise of mortdaunce, because, if the term had been for life, the ancestor could not be said to have died seised in his demesne as of fee, while another had the freehold; though indeed he might, if the term had only been for years.

And this action lay not only against the person himself who had the term, but against all those who had an entry within the *degrees* and the *time* limited to this action. This action was allowed within the third *degree* of kindred, and within such *time* as could be testified *de proprio visu et auditu*. It held not only in the above case, but where a person had his entry *per alium*, who was seised in right of some other, and so aliened; as where a canon aliened without assent of the chapter, a wife without assent of her husband, a husband without assent of his wife, and the like; it held also against those who gained their entry through the medium of a guardian, or bailiff only, who had no right to alien.

(a) Bract. 317. b.

The most general form of a writ of entry was that which supposed the person against whom it was brought, to have holden the land *ad terminum qui præteriit*: upon which writ there might be a *narratio*, containing such special matter as constituted the merits of the case. The following was the form of this writ: *Præcipe A. quòd justè et sine dilatione reddat B. tantùm terræ cum pertinentiis in villâ, &c. quod idem B. ei dimisit AD TERMINUM QUI PRÆTERIIT, ut dicit; et nisi fecerit, et B. fecerit te securum de clamore suo prosequendo, tunc sum. per bon. sum. præf. A. quòd sit coram justitiariis nostris ad primam assisam, cùm in partes illas venerint, ostensurus quare non fecerit, &c. (a)*

The process upon this writ was the same as on a writ of right; except that the tenant who might have the essoin *de malo veniendi*, could not have that *de malo lecti*, unless the writ of entry was turned into a writ of right by the *narratio*, or counting upon it, *propter longissimum ingressum*, on account of such a length of entry as could not be proved *visu proprio et auditu*, but only by that of some one else. If it was reasonable that when this writ of entry became a writ of right, it should have all the consequences attending that writ, whose nature it had assumed by the manner of counting; so likewise, on the other hand, when a writ of right was turned into a writ of entry, as happened not unfrequently, it entirely ceased to be a writ of right in all respects, and there was no longer therein the essoin *de malo lecti* (b).

Before more is said concerning the change of a writ of entry into a writ of right, and of a writ of right into a writ of entry, the reader must recollect, that the writ of entry has already been spoken of as an invention since the time of Glanville; and was contrived, no doubt, to avoid the necessity of recurring to the duel and great assise, whose determination could never afterwards be re-considered. Thus this new writ was framed in the nature of that for

(a) Bract, 317. b. 318.

(b) Ibid, 318.

which it was to be an occasional substitute; and so great an affinity was still discernible between them, that we see, in these and many other instances they were convertible, that is, either of them might become the other to all intents and purposes. How that was effected, will be rendered clearer by a few instances.

When it was attempted to convert a writ of right into a writ of entry by the counting, and the demandant said, that he was ready to prove it by a jury; yet it was in the election of the tenant, whether he would put himself upon the jury to try the entry, because he had three remedies: for he might either defend himself by the duel, or put himself upon the great assise to try the right, or upon a jury to try the entry. Thus, as it was at the option of the tenant to chuse which of these he pleased, the writ of right was not changed into a writ of entry (notwithstanding the counting), till the tenant had chosen to put himself on a jury to try the entry; as for instance, if a writ of right was brought containing the words necessary to include the *jus merum*; and then there was added this clause: *Et in quam non habet INGRESSUM nisi per talem antecessorem suum, qui terram illam ei dimisit ad certum terminum, &c.* though these were words perfectly proper to bring in question the entry, and though it was within the time to prove it *proprio visu et auditu*; yet a writ of right would not, by so doing, become a writ of entry, but would continue as it was, unless the tenant voluntarily put himself upon a jury to try the entry (a).

A writ of entry was sometimes changed into a writ of right, not by choice, as in the above-mentioned change, but through necessity; either *propter longissimum INGRESSUM*, the great distance of time at which the entry was alleged, or *propter donum et feoffamentum*. That was called *longis-*

(a) Bract. 318. b.

simus ingressus, which could not be proved *proprio visu et auditu*, but was obliged to be proved by tradition; as *de visu et auditu patris*, who enjoined his son to give testimony thereof: in which case, out of necessity, from the want of proof, the tenant was forced to put himself upon the great assise, or defend himself by duel. Thus, suppose an entry was laid so far back as the time of Henry II. or later, yet so as not to be within the limitation of a writ of mortuancestor; as suppose thus: *Et unde A. non habet ingressum nisi per B. qui non nisi custodiam inde habuit, &c.* and then was added, *et unde prædictus, &c. fuit seisitus in dominico suo, ut de fædo, et jure tempore talis regis capiendo inde expletia, &c. et de tali descendit jus, &c.* as in a writ of right; in this case, the tenant was obliged to put himself upon the great assise, or defend himself by duel, for want of other proof: but, would the distance of time allow it, he might, if he chose, have put himself upon a jury to try the entry (a).

Thus far for the change *propter longissimum ingressum*, or the antiquity of the entry. The other, *propter donum et feoffamentum*, was, where a feoffment was opposed to the entry, which might be stated in this manner by the tenant: *Defendit talem ingressum, et dicit, quòd habuit ingressum per antecessorem illum (de cujus seisinâ idem Petrus petiit terram illam) qui de terrâ illâ feoffavit eum tenendum pro homagio et servitio suo, et quòd tale fuit jus suum per feoffamentum et non per talem ingressum ponit se in magnam assisam*; upon which the assise proceeded to try the issue, whether the tenant had more right to hold the land for the homage and service by reason of the feoffment, or the demandant to hold it in demesne (b).

To return from this digression upon the reciprocal changes of writs of entry and writs of right; and to go on with the manner of proceeding in a writ of entry. The

(a) Bract. 318, b. (b) Ibid. 319.

process, as was before said, was the same as in the writ of right, and therefore need not be particularly noticed in this place. When both parties appeared, the demandant was to begin by stating his *intentio*. If he was only a tenant for life, he was to claim the land, *ut jus meum possessorium*; if in fee, *ut hæreditatem*; and then go on, *in quam talis non habet ingressum nisi per talem, &c.* To this the tenant might answer by denying the right of the demandant *per talem*, and say, that he had not an entry *per talem* mentioned in the writ, but *per alium talem*; and of that he might put himself upon an inquest. It appears from Bracton, that this inquest might be taken before the sheriff, and the *custodes placitorum coronæ in pleno comitatu*, and then there issued a writ of inquiry to the sheriff; or it might be, *coram nobis*, or *coram justitiariis nostris apud Westmonasterium*: and in that case, there was a writ of *venire facias*, as it is since called (a). Whether this matter was to be tried before the sheriff, or before the justices, depended probably upon the return of the original writ, which we have seen had sometimes the one, and sometimes the other return; or it might perhaps be at the option of the party to chuse the sheriff; or the justices might reserve only such questions as were thought to be of great difficulty, to be tried at the bar of the court: but that in a *commune placitum* the jurors should be summoned to try such an issue *coram nobis*, seems very particular, and not easily to be accounted for (b). When a *præcipe* was returnable before the justices assigned, the issue was, most probably, tried before them also; and probably it rested merely on the option of the demandant, whether the original writ should have the one or the other return. It was not unusual to cause a jury, which had been summoned before the justices assigned, to be removed into the superior court at Westminster;

(a) Bract. 319. a. b.

(b) Vid. ant. 244. Magna Charta.

for which purpose there issued a special *venire facias*; and if the jurors made default, a *habeas corpora recognitorum*, which had sometimes a clause directing the sheriff to fill up what vacancies had happened among the jury by death or otherwise (a).

We have above supposed that the issue went to a jury to be tried; but before this, it was necessary that both parties should take such steps to prove, or raise a presumption in support of their allegations, as was required in other actions determinable by jury. The *intentio* was not in this, any more than in other actions, to be taken on the *simplex loquela* (b) of the demandant: he must produce proof, if he could; or, if he could not, he must raise a presumption by a *secta*, which was open for the other side to defend *per legem*. If the demandant had neither, the tenant had no need to answer the action at all, and the writ was lost; unless, says Bracton, as some thought, he might, and ought *de gratia justitiariorum*, to be assisted by a jury of the country. But this was to be only upon some good cause being shewn: either that the instruments on which he relied for proof of the matter, were lost; or that he had them not at hand, or could not get them without difficulty, to make use of on that occasion. In such cases, it seems, the court would direct the matter to be tried by a jury; and another day would accordingly be given to the parties (c).

If the parties did not go to issue in the above way, it was because the tenant chose to except to the action. The exceptions he might make were many: he might say, that some one else had more right than the demandant; that another made the demise, and not the person named in the writ; that the term was not expired; or, if it was expired as far as limited by one instrument, that it had been enlarged by another, which he then exhibited; that the time exceeded the limitation in a writ of mortdauncestor, and therefore

(a) Bract. 325. b. 326.

(b) Vid. ant. 248.

(c) Bract. 820.

the proof would be defective. These and numberless other exceptions might be taken (a). The tenant might vouch to warranty the person *per quem* he had his entry, and that warrantor might vouch another; and so on, to the fourth degree, but not beyond.

The writ of entry lay properly only against a freeholder; that is, one who had an estate for life, or in fee, or in fee-farm, and such only was considered as properly tenant. However, in truth, says Bracton, if this writ was brought against a farmer, it would not fail, for he might call his warrantor; and if he defended him, the farmer would retain his usufruct: if not, he might have his resort to the warrantor, as far as his usufructuary interest went; and the warrantor over against his warrantor, as far as his freehold interest was concerned. Notwithstanding what Bracton here says concerning a farmer, he afterwards lays it down most positively, in conformity with what was said above, that a writ of entry would not lie against one who held for a term of years, because he did not hold the freehold in demesne, but only the usufruct; and much less would it lie against a tenant from year to year (b).

The writ of entry *ad terminum qui præteriiit*, which we have hitherto been speaking of, lay for that person who had himself made the demise: when it was brought by the heir of the demisor, it was altered accordingly; as, *in quod, &c. non habet ingressum nisi per talem, cui talis pater*, or whoever the ancestor might be, *illud dimisit ad terminum qui præteriiit, &c.* (c)

Thus were writs of entry varied according to the circumstances of the case upon which they were founded; and some of them received appellations from the effective words in the writ. One was afterwards called a *cui in vitâ*; which was brought by a widow when her husband had made a gift of her inheritance. This writ was in the

(a) Bract. 320. b. (b) Ibid. 321. Vid. ant. 302, 303. (c) Bract. 321.

following form: *Præcipe, &c. quodd, &c. reddat tali, quæ fuit uxor talis, &c. quam clamat esse jus & hæreditatem suam; & in quam prædictus talis non habet ingressum nisi per præd. quondam virum suum, qui illud ei dimisit, CUI IPSA IN VITA SUA CONTRADICERE non potuit, &c.* (a)

The usual answer to this action was, that the wife appeared on such a day personally in the king's court, and there, of her free will and consent, granted and confirmed the gift made by the husband; for proof of which the record thereof was to be inspected, where there ought to be special mention made that the woman consented: upon such consent, says Bracton, a chirographum was made, which, together with the record, was now vouched; for it was a rule, that the record without a chirographum would not bar the widow's action. In other words, this was a plea of a fine. If a gift by the husband was what they called *voluntary*, it was not valid without the above circumstance of the woman's consent signified in court; but if the gift had been made, as they called it, *in causâ honestâ et necessariâ*, as to a son, or with a daughter in marriage, then it was binding upon the wife without these solemnities (b).

Again, in case of a voluntary alienation of the wife's land by the husband, if she died before him, then the son who was her heir might have a writ of entry in the following words: *In quam non habet ingressum nisi per talem virum ipsius talis, cujus hæres ipse est, qui illam ei vendidit in vitâ suâ, cui prædicta talis in vitâ suâ contradicere non potuit, &c.* (c) If a second husband aliened the wife's dower by her first husband, she might, after his death, have a writ of entry, *quam clamat esse rationabilem, &c. et in quam prædictus talis non habet ingressum nisi per talem*, her second husband, *qui illud ei dimisit, cui ipsa in vitâ suâ contradicere non potuit, &c.* and the heir of her first husband,

(a) Bract. 321. b.

(b) Ibid. 321. b. 322.

(c) Ibid. 322.

in case she died before her second husband, might have a writ of entry applicable to the nature of his claim, whether the second husband held himself in seisin, or the wife had aliened: *In quam non habet ingressum nisi per talem, qui illud ei dimisit, et qui illud tenuit in dotem talis uxoris, &c.* or, *nisi per talem, quæ fuit uxor talis, quæ illud tenuit in dotem, &c.* (a)

The cases in which a writ of entry was the proper remedy, were very numerous. We shall enumerate some of them. If an abbot, prior, or bishop, demised without assent of the chapter, or the chapter without assent of those whose assent was required by law; then there was a writ, *non habet ingressum, nisi per talem quondam abbatem, &c. qui illud ei dimisit SINE ASSENSU CAPITULI* (b), and the like. The writ here mentioned was called a writ of entry *sine assensu capituli*. So if a wife demised without assent of her husband, *non habet ingressum nisi per præd. talem mulierem, quæ illud ei dimisit sine assensu et voluntate prædicti talis quondam viri sui, &c.* So if a bailiff demised without the consent of his lord. If a tenant was convicted of felony, the lord might have a writ to recover his escheat: *Non habet ingressum nisi per C. de N. qui eam TENUIT, &c. ET QUÆ, &c. ESSE debet ESCHÆTA propter feloniam de quâ idem C. &c. convictus fuit et damnatus, et quam terram idem C. dimisit, &c.* which was called a writ of escheat. Again, if any one had his entry by one who held in villenage; by one who was *non compos sui nec sanæ mentis*; by one who held only for life, whether in dower, or *per legem terræ*; the remedy was by writ of entry. In cases of a writ brought by the reversioner after an estate for life, the writ, after *ut dicit*, always had these words: *unde queritur, QUOD ipse talis injustè EI DEFORCEAT, &c.* (c) from which words the writ was afterwards named *quodd ei deforceat*.

(a) Bract. 323.

(b) Ibid. 322.

(c) Ibid. 323. b.

A writ of entry lay, if any one intruded into the inheritance; *non habet ingressum nisi per hoc, quod ipse se intrusit, &c.* If a man aliened land of which he had the custody; *non habet ingressum nisi per C. qui non nisi custodiam inde habuit, &c.* with some small difference in the words when the heir claimed of his own seisin, and when of his ancestors; *dum idem B. fuit infra ætatem in custodia, &c.* It lay when a common of pasture was demised; *non habet ingressum nisi per C. (cujus hæres idem B. est) qui pasturam illam ei dimisit, ad terminum qui præteriit, &c.* But it only lay of a common in certain (a). These, in addition to such writs as have been mentioned in the former part of this chapter, are all the writs of entry to be found in Bracton. These are applicable to very many cases of ouster of freehold; and from the general conception of *ad terminum qui præteriit*, and the infinitude of circumstances and situations which might be included within those general words, it was possible to make this remedy much more universal.

We have before examined whether a writ of entry would lie *against* a farmer, or tenant for a term of years (b). We shall now see whether it would lie *for* persons of that description. It is said by Bracton, that a farmer who had demised *ad terminum qui præteriit*, might demand his own seisin, though he had no right in the freehold; for he had a possessory right of some kind or other; and therefore, according to our author, was intitled to an action grounded upon his own demise, and his own act. A writ of entry, however, brought by one who held for term of years, or for life, could never be turned into a writ of right; it being a rule, that an action upon the possession, merely, should never be turned into an action upon the right, nor *è converso* (c).

Notwithstanding what was before said, of a writ of entry being limited to the time to which a writ of mort-

(a) Bract. 324. 324. b. (b) Vid. ant. 393. (c) Bract. 326. a. b.

Time per narrationem

ancestor was confined, there was a case, where, of necessity, and because no other action could be had, this writ would lie beyond that period: as where one who held only for life, demised for a very long term, which exceeded the period of a writ of mortancestor; and then as he had not such an interest as would entitle him to a writ to try the mere right, he was allowed to try the entry by a jury; as also was a tenant in fee, in the like circumstances, who could not count *de usu et expletiis*, which was always necessary in a writ of right (a).

Another limitation of this action was the degrees within which it was confined. It never was allowed beyond three degrees; which were reckoned in this way. If the writ was of the kind we mentioned first, *ad terminum qui præterit*, on the demandant's own demise, this was one degree. If the tenant was said to have his entry *per* such a one, that constituted two degrees. If the entry was *PER* such a one, *CUI* the land in question was demised by some ancestor of the demandant, this was in the third degree (b). A writ of entry was not allowed beyond this, and the party must, in case his demise was further removed, have recourse to a writ of right. It is stated by Bracton as a question, whether the passing of land from an abbot to his successor was counted as a degree, in like manner as from one heir to another; and he thought not: for though the person was changed, yet the dignity and capacity, which was the principal consideration, remained the same (c).

(a) Bract. 326, b.

(b) Fleta, 360.

(c) Bract. 321.

CHAP. VII.

HENRY III.

Writ of Right in the Lords Court—Process in Real Actions—Summons—Of Essoins—De Malo Lecti—Defaults—Magnum Cape—Warrant de Servitio Regis—Parvum Cape—Writ of Quo Warranto—The Count—Tender of the Demi-Mark—Defence—Of granting a View—Vouching to Warranty—Nature of Warranty—Proof of Charters—Warrantia Chartæ—Of Pleading—Of Prohibitions—Attachment sur Prohibition—Of Jurisdiction—Abatement of the Writ—Pleas to the Person—Of Bastardy—Writ to the Ordinary—Of Minority—Excommunication—Parceners—Pleas to the Action—Non Tenure—Majus Jus—Release—Fine and Non Claim—Of Personal Actions—Attachment—Execution of the Writ.

HAVING gone through assises and recognitions, which went upon a possessory right, to recover a man's own seisin, or that of his ancestor; and also suits upon an entry; it remains only to speak of an action for the recovery of a right and property grounded either upon a man's own seisin, or that of his ancestor, who did not die thereof seised; in which action, both the right of possession and the right of property were determinable; and after judgment therein, either upon the assise or duel, no recourse could be had to any other remedy; the judgment being, that the demandant should recover seisin to him and his heirs quietly, as against the tenant and his heirs for ever (a).

(a) Bract. 327. b. 328.

The writ of right and the proceedings thereon are treated more fully by Glanville than any other action; but this, as well as other branches of learning, had made great advances in improvement since the time of that writer: these are stated very minutely in the great authority by which we are so much assisted in our inquiries during this reign; and we should not fulfil our duty to the reader, if we withheld such further information as can be derived from that source, on so important an article as the proceeding in a writ of right. Should the reader be a little retarded by sometimes recurring to what has been before said on the same subject, it is to be hoped, that, on this, as on other occasions, his patience will be rewarded by the new lights which he will thence receive, to guide him in the future progress of this History.

The writ of right to the lord's court underwent no change in its form and language, though that in the king's court had some few words inserted which were not in it in Glanville's time. The words which mention the land to be held of the king *in capite* were probably added in consequence of the provision of *Magna Charta* about *præcipes in capite*, with design to shew that the present was a proper subject for the king's court, and not within the prohibition of that act (a). The writ ran thus: *Præcipe, &c. quòd, &c. reddat, &c. tantum terræ, quod clamat esse jus et hæreditatem suam, et tenere de nobis in capite; et unde queritur, quòd, &c.* and so on, as in the old writ; only the return was *coram justitiariis nostris apud Westmonasterium* (b).

Since the provision of *Magna Charta* about *præcipes in capite*, writs of right were, of course, more generally brought in the lord's court, and from thence were removed to the county, and sometimes to the superior court. The removal to the county was allowed only when the lord was

(a) Vid. ant. 250.

(b) Bract. 328. b.

proved *de recto defecisse*. Many were the occasions when this failure of justice might be said to happen; as when the deforçant claimed to hold of a different lord from the demandant; when the real lord had no court, or refused to hear the cause, or no one was in court to hear it; in which cases, recourse could not be had to the chief superior lord, because the writ directed particularly, *si, &c. non fecerit, VICECOMES hoc faciat*. Again, if a person who lived out of the lord's jurisdiction was called to warranty; if the deforçant essoined himself *de malo lecti* out of the limits of his jurisdiction, where the four knights could not make the view; if the tenant put himself on the great assise; all these, and an infinitude of other matters, were causes of removal, as producing a failure of justice. The method of proceeding in the lord's court was different in different places; only in praying a view, vouching to warranty, and sometimes in pleading, in waging duel, and in some other matters, the course of the king's court was observed (a).

When the officer, or serjeant sent by the sheriff, had attested in the county court, that there was a failure of justice in the lord's court (and the officer's report in this point was a record), then the demandant prayed the judgment of the court thereon; and accordingly the tenant was commanded to be summoned to answer at the next county court; at which time they might either appear, or essoin themselves. If the demandant appeared, but the tenant did not, then, upon the summoner attesting the summons, he was proceeded against for the default, according to the custom of different counties, either by caption of the land into the king's hands, or otherwise. The custom in the county of Lancaster, which is said to have been approved by the famous Pateshull, was this: the tenant was summoned twice, and if he did not then appear, and the summons was proved, the judgment of the court was, *quòd capiatur*

(a) Bract. 329. b.

parvum nampium on the land, in name of a distress, and the tenant was summoned a third time to appear at the third county; if he did not then come, the judgment was, *quòd capiatur magnum nampium*, that is, the *averia* and chattels, double the first, by way of afforcing the distress, and he was summoned a fourth time; when, if he did not come, there was a *capiatur terra* into the king's hands, and a fifth summons; and if he appeared not, nor replevied the land, the demandant had judgment to recover seisin by default (a). From this specimen of the practice in the county of Lancaster, we are left to conjecture what was the nature of that in other counties.

While the suit was in the county court, if a person was vouched to warranty, that court could not summon the warrantor, but recourse was had to the king's writ *de warrantia*, which commanded the person to warrant the land in question in the county; *et nisi fecerit, quòd sit in adventu justitiariorum, &c.*: so that, if the warrantor did not enter into the warranty in the county, day was given to all the parties before the justices *in itinere*, where the plea of warranty was determined, and then the principal suit was remanded back to the county court, if the justices so pleased; though that, as well as the warranty, might, *de gratia*, if they pleased, be determined before them without any writ of *pone* (b).

If the tenant put himself upon the great assise, a day was given to the next county; and, in the mean time, he applied for a writ of peace till the coming of the justices at the next assise; which writ he was to obtain in person, because he was to make oath that he was tenant, and had put himself on the assise. The writ of peace, the prohibition to the sheriff, that for summoning the knights, and the assise, were much the same as in Glanville's time, both in the words and the practice of them; only the jurors were to appear *coram justitiariis ad primam assisam, &c.* (c).

(a) Bract. 330.

(b) Ibid. 331.

(c) Ibid. 331, 331. b. 332.

Should a suit be removed by *pone* from the sheriff's court to the court above, in the interval, before the warrantor appeared before the justices itinerant, there was, however, no mention of the warranty in the writ of *pone*; but after the usual essoins and delays, the demandant counted afresh, from the day on which the vouching was in the county; and so the tenant was obliged to vouch again, and the day appointed before the justices itinerant became void (a).

A writ of *pone* was rarely granted on the prayer of the tenant, except for some special reason, which was to be expressed in the writ; as thus: *Pone ad petitionem tenentis eò quòd agit in partibus transmarinis, &c. loquelam, quæ est, &c.* If the tenant could not appear; if the demandant was related to, or a servant or friend to, the sheriff; if he was very powerful in the county, or was sheriff himself; all these were causes sufficient to entitle the tenant to remove the suit. There were some cases in which the demandant was obliged to remove the suit, on account of the privilege of the tenant; as where he was a Templar or Hospitaller, or of any other description of persons who had the privilege of answering to no suit, except *coram rege, vel ejus capitali justitiario*. There were cases of necessity, in which also the suit was to be removed; as where bastardy or any thing else was objected, which the county could not legally decide or try (b).

In the same manner were suits removed from the county and court baron to the justices *in itinere*. There was also another cause of removal from the county court. This was on account of a false judgment; in which case, likewise, the removal was by *pone* (c).

When the suit was thus removed by *pone*, the tenant was to be summoned to appear. The summons of the tenant is treated of by Glanville. Some few things may be added to render his account more satisfactory, as well as to give

(a) Bract. 332.

(b) Ibid.

(c) Ibid.

a comparative view of process in general, whether in actions real, personal, or mixed.

The most common process in use was the Process in real actions. summons; and after that, in some cases, there followed either a caption into the king's hands for default, or an attachment, according to the nature of the action. Another process was, what Bracton calls a command or precept of the king, without any other summons, *quòd sit coram eo responsurus*, or *facturus*, &c. or that he should have such a one there, *ad respondendum*, or *faciendum*. There was another, commanding the sheriff, *quòd faciat venire*, or *quòd attachiet*, or *quòd habeat corpus*, or *quòd ita attachiet quòd sit securus habendi corpus*. Many of these have been noticed in the foregoing account of proceedings. We shall now confine ourselves more particularly to the summons, which was the usual process in real actions, as well those that were possessory as those that concerned the *proprietas*; and also in personal actions, in matters of contract, or for any injury.

A summons was either *general*, or *special*. There was a *general* summons before the eyre was held; this was to be in some very public place; and might be followed by *essoins*, to excuse the absence of those who ought to attend. A *special* summons was in some particular action, to which if a person did not appear, he would be in default, although he was *essoined* upon the general summons (a).

What we have to say upon summons will be chiefly confined to this latter kind. It appears Summons. from Bracton, that if the party could be found any where in the county, he might be summoned; though if the summoners could not find him at his own house, they needed only shew the summons to some of his family, and not seek him further. If he had more houses than one in the county, the summons was to be at that where he mostly

(a) Bract. 333.

lived, or had the most substance: if he had no house nor demesne, it was to be at his fee. The summoners were to be at least two in number, who were to testify before the court that they had executed the summons. A summons ought always to be served fifteen days before the day on which the party summoned was to appear: and if there were fewer days, the summons was illegal, unless in some particular cases where dispatch was required; as when a church was vacant; when the parties were living in the county where the eyre was; or in cases where merchants were concerned, who were entitled to what Bracton calls *justitia pepoudrous*. Again, on the other hand, sometimes a longer time was allowed for summoning; as on account of a journey; and the time was lengthened according to the length of such journey. But the common and legal summons, says Bracton, was fifteen days before the appearance (a).

A summons was illegal, if it was made only by one summoner; or by false summoners, and not by the sheriff and his bailiffs. Again, if it was made when the tenant was beyond sea, or upon his journey, or even *cum iter arripuerit*, when he was just set out; or if he was not found within the county, the summons was not binding (b); for a man was not to accept a summons at all times and places, nor from every body, but only from those who had a proper authority.

When the tenant appeared, he might object any of the above irregularities as an exception against the summons. If he did not appear at the day of the summons, and the sheriff did not return the writ, recourse must be had to another writ, that being now out of date; but if the sheriff had returned the writ, then, on account of the tenant's default, if it was in a real action, his land was taken, as in Glanville's time: but the writ on this occasion was now called *magnum cape*; and if, after the first caption, he

(a) Bract. 333. b. 334.

(b) Ibid. 336. b.

failed appearing at another day, he lost his seisin. There was another caption of the land by force of a writ that was called *parvum cape*; in all defaults after the first appearance the caption was made by *parvum cape*, which was the case in which Glanville says he could not replevy (*a*). Thus, whereas in Glanville's time the caption was not till the tenant had been summoned three times, it was now after the first summons that the *magnum cape* issued.

If a person was lawfully summoned, and did not appear, he would be punished as a defaulter, unless he could send a proper excuse or essoin. The law of essoins has already been mentioned; but it is treated so minutely by Bracton, and was of such importance in the judicial proceedings of this period, that it deserves to be re-considered.

One principal excuse for not appearing to a summons, was being *in servitio regis*. This, ^{Of essoins.} however (*b*), was not admitted as an excuse if the party had been first summoned, because he might have sent his attorney to appear for him; nor even then would it avail, if he could conveniently come himself, or send. But this is laid down as the strictness of law by Bracton, who admits that the king's pleasure should prevail, notwithstanding any of the above circumstances. The next essoins were what were called in Glanville's time, *ex infirmitate veniendi*, and *ex infirmitate* (*c*) *reseantisæ*; which were now termed *de malo veniendi*, and *de malo lecti*. Besides these, there were several others, that recurred less frequently; as a peregrination, or any restraint imposed on a party; or if he was detained by enemies, or fell among thieves (*d*); or was stopped by floods, a broken bridge, or tempest; unless, indeed, it could be proved that he set out at an unseasonable time, or suffered those impediments through want of proper caution and care on his part. Being impleaded in the king's court, was a good reason

(*a*) Vid. ant. 114. (*b*) Bract. 336. b. (*c*) Vid. ant. 115. (*d*) Bract. 337.

for not attending in an inferior one; or even, according to Bracton's opinion, being impleaded in the ecclesiastical court was a good excuse.

A person having any of the beforementioned excuses ought to send one to make it for him. The form of making the essoin was to say, "that his principal, as he was coming to the court (if it was the essoin *de malo veniendi*) was seized with an infirmity in the way from his house to the court, so as not to be able to come either *pro lucro* or *pro damno*, and that he was ready to shew this." It was not now the practice, as it had been (a), for the essoniator to give any surety for proving the truth of this, but credit was given to his verbal declaration; though it seems, that in the case of barons, and other great persons, who could better command a security, the law imposed on them the burthen of finding pledges. In common cases, therefore, the essoniator gave his faith, that he would produce his principal at another day, to warrant the essoin, and prove it (b) upon his oath.

As in actions, so in casting essoins, a certain order was to be observed: thus, if a person was detained by some illness, he would cast the essoin *de malo veniendi intra regnum*, and this might be followed by that *de malo lecti*; after this, the party would not be permitted to remove himself *extra regnum*, so as to cast the essoin *de ultra mare*. The essoin *de ultra mare* was of various kinds; namely, *de ultra mare Græcorum*, and, *de citra mare Græcorum*. In the simple essoin *de ultra mare*, there was a delay of forty days at least, and one ebb and one flood. If there was mention of any remote place, accompanied with some cause of necessary absence, as a peregrination to St. Jago, or being with the army in Germany, or Spain, then a longer time was allowed, according as it should seem proper to the justices. The same discretion might be exercised by

(a) Vid. ant. 115.

(b) Bract. 337. b.

the justices, where the absence was in some distant part of the kingdom; but they could never shorten the legal period of fifteen days. The *essoïn ultra mare Græcorum*, was usually in cases of peregrination to the Holy Land. And here they made a distinction between a *simplex peregrinatio*, and a *generale passagium*. In the former, the time allowed was, at least, a year and a day (a): in the latter, the plea remained *sine die*. This latter privilege was granted in favour of those who were *cruce signati*; and it seems to have been allowed in consequence of a papal decree which declared, that till the death or actual return of such persons, all their property should remain entire and untouched.

It was held, that a person might have the *essoïn de peregrinatione ad Terram Sanctam*, and afterwards that *de ultra mare*; and then, when he returned, he might have that *de malo veniendi*, and afterwards that *de malo lecti*: but if he had had that *de malo veniendi*, he could not, as was before said, recur to that *de ultra mare*; and if he had had that *de ultra mare simpliciter*, he could not have that *ad Terram Sanctam*; the rule of *essoïns* being, *approximare possunt regno, cùm fuerint implacitati, elongare autem non*. A person who was absent upon a *simplex peregrinatio*, and staid beyond the year and day, might have another forty days, and one flood and one ebb, by reason of the *essoïn de ultra mare simpliciter*; and if he still staid, he might have fifteen days at least, by an *essoïn de malo veniendi citra mare*; and if a reasonable cause could be shewed, the justices, as we have before seen, might allow more. After this, if he did not appear, he would be in default (b). Indeed, when a person, by casting the *essoïn de malo veniendi*, admitted himself to be on his road to the court, there would have been an absurd contradiction in allowing him

(a) Bract. 378. b.

(b) Ibid. 339.

to cast another, which expressed that he was out of the kingdom. The *essoïn de servitio regis* was likewise sometimes *in regno*, and sometimes *ultra mare*; and this likewise was sometimes followed by that *de malo veniendi*, and afterwards by that *de malo lecti* (a).

The *essoïn de servitio regis*, which was more peremptory than any of them, being without any limitation of time, was not allowed in certain pleas. Thus, it was not allowed in an assise *ultimæ præsentationis*, for fear of the lapse; nor in dower, because of the consideration due to a widow who had only a life-estate; nor, as some thought (b), in the *assisa mortis antecessoris*, in favour of the infant. It did not *de jure* lay for a person not immediately in the king's service, though it was allowed *de gratiâ*, as was before said; nor for one constantly in the king's service, unless while he was actually employed in some expedition: it did not lay for the attorney, as a person so engaged should not be an attorney. Bracton repeatedly lays it down, that the king's warrant for this *essoïn* should never be granted but on a reasonable cause; though, on the other hand, he is as explicit in declaring that, whatever might be the cause, the justices should not quash it, but wait the king's determination thereon.

The *essoïn de malo veniendi* implied that the party was taken ill on the road; and therefore, if the *essoniator*, upon interrogation, said he left him ill at home, it would not be allowed: though a case might happen, where, of necessity, it must be received; as if the party had been *essoïned de malo lecti* in some other action, and *languor* was adjudged, he must, under that return, confine himself to his house; and therefore, when summoned in another action, and intitled to the *essoïn de malo veniendi*, it must of necessity be received, though he was actually in his own house. The confinement which the adjudication of *languor* imposed

(a) Bract. 338. b.

(b) Ibid. 339. b.

on the party dispensed with the strictness otherwise observed in this, and some other cases (a).

Having thus mentioned generally the nature and effect of these essoins, it next follows, that we should inquire by whom and where they might be used. In the first place, no minor, when known to be such, could essoin himself; nor could a person of full age be essoined against him, especially in an assise; for a person of full age, if present, could say nothing to prevent the taking of the assise; though it should seem as if he might be essoined in a suit for land, of which he was first enfeoffed himself. The reason given by Bracton why a minor should not be essoined, is, because he could not swear, nor warrant the essoin. No essoin lay for a disseisor, for though he did not come, his bailiff might; nor for the bailiff. This rigid practice seems to be *in odium spoliatoris* (b), who ought not to be indulged with a delay of fifteen days; though it lay for the demandant, who was the person spoiled. It did not lay for one committed *corpus pro corpore* in custody to answer; nor for any one where the sheriff was commanded *quòd faciat eum venire*, or *quòd habeat corpus ejus*, if the process had gone through the whole *solennitas attachiamentorum*; but on the first day of attachment the party might have an essoin; for it was a general rule, that *de jure* an essoin might follow every summons, or attachment, where a plea depended; on the contrary, it was a rule, *ubi nullum placitum, ibi nullum essonium*.

An essoin did not lay for a person who had appointed an attorney, unless they had by accident both essoined themselves; nor for one who had already essoined himself, till he appeared; nor for one appealed *de forciâ*; nor in an appeal *de pace*, *de plagis*, or *de roberiâ*; notwithstanding which it is laid down by Bracton, that if such persons did not appear, they would be excused by proper essoin. Sometimes

(a) Bract. 340.

(b) Ibid. 340.

there would be a *dies datus consensu partium sine essonio*; and in such case, neither would be permitted to essoin. If a person was seen in court before the essoin was cast, the essoin would, nevertheless, be admitted. An essoin would not lie, after a caption of land *in manus regis* for a default (a).

If a writ was against several who held *in communi simul et pro indiviso*, each might have an essoin *de malo veniendi*, together on the same day, or one after another on diverse days (b), till each had had an essoin; and none should have more than one essoin till all had appeared together; so that those who were essoined first, might have several appearances, and several days, till all appeared together: but an essoin was not allowed at every appearance, on account of the infinite delay this would occasion. If the inheritance had been divided, and one was impleaded alone for his part, and he declined answering without his *participes*, or *parceners*, and they were summoned; each had one essoin before appearance, but not *vicissim*, till it was established that they were *participes*, and then they essoined *vicissim*, as beforementioned. If the tenants to the writ were not *participes*, but held by different rights, they could not essoin *vicissim*, because these were different pleas: the same where they held *pro diviso*. But husband and wife might essoin *simul et vicissim*, like *participes*, on account of the entirety of their rights; and if one made default, it affected them both; which was not the case even with *participes* (c). When all the *parceners* had appeared together, and it happened that one or more of them afterwards essoined himself, or a day was given to the parties, if present, they might recommence their essoins, as at the first day of summons. In like manner, if the writ contained more than one demandant, whether they were *participes*, or husband and wife, they might essoin *simul et vicissim*.

(a) Bract. 341.

(b) *Simul et vicissim*.

(c) Bract. 341. b.

If a demandant or tenant, not chusing to appear himself, appointed an attorney, then the essoin was to be made in the person of the attorney, and not in that of the principal, except, as will be seen hereafter, in the essoin *de malo lecti* (a). Yet, if the attorney should die, the principal might essoin himself and his attorney *de morte*, as it was called; and he might remove his attorney and essoin himself; but it was only in these two cases that the party could cast an essoin after appointing an attorney (b).

If one or more persons were vouched to warranty, before appearance both voucher and vouchee might have an essoin; and if the vouchers were more than one, they might essoin *simul et vicissim*, as before mentioned; so if the tenants were more than one (c). After the wager of duel, the champion, as well as his principal, might essoin *simul et vicissim*.

The time for making the essoin was the first day, that is, on the return of the writ; and it was not sufficient, says Bracton, if the essoin was made on the second, third, or fourth day; yet, adds the same authority, the person summoned was to be *expected* till the fourth day, in case he should come, or send a messenger to excuse his absence, if he had such matter to allege as would constitute a good essoin: and if he had, and caused himself to be essoined even on the second or third day, it seems, from Bracton, that the essoin would be allowed, and a day would be given him by his essoniator; yet, at that day, if the demandant pleased to proceed on the default, the court would allow him so to do; and if the tenant could allege none of the excuses abovementioned for his delay, he would lose his seisin.

The essoin was to be made in open court, before the justices; nevertheless, if by mistake it was made before another, it was allowed *de gratiâ*, like the essoin cast after the first day, as just mentioned; and the default would be saved, unless the demandant proceeded for judgment on

(a) Bract. 342.

(b) Ibid. 342. b.

(c) Ibid. 343.

the default, when such an essoin would be adjudged to be null and void.

An essoin might be had upon every appearance, and day given in court, whether on praying a view, vouching to warranty, or on a day given *spe pacis*, as it was called, at the prayer of the parties, in order to compromise the matter in dispute, or for any other purpose (a).

De malo lecti. The essoin that occasioned most discussion in the practice of real actions was that *de malo lecti*, which commonly followed immediately upon that *de malo veniendi*; for where a person, having been detained on the road by sickness, and having cast the essoin *de malo veniendi*, had found himself obliged to return home; the order of essoins, conformably with what was likely to be the real fact, led to the essoin *de malo lecti*. Upon this, it was usual for the court to direct a view, to see whether it was, as they called it, *malum transiens*, or whether it was *languor*: if the former, then he had another day, at the distance of fifteen days at least; if the latter, he had the space of a year and a day. But the essoin *de malo lecti* did not, in all cases, follow that *de malo veniendi*. It did not follow it, in a writ of entry; unless when the writ of entry was turned into a writ of right by the form of counting; so on the other hand, when a writ of right was by the form of counting turned into a writ of entry, and the tenant put himself upon a *jurata*, the essoin *de malo lecti* would not be allowed: the same, if in a writ of right the counting was of an inheritance descending from a common stock to co-heirs; for this could not be determined by the duel, or great assise. For the same reason it was not allowed in a writ of right of dower; it being laid down as a general rule by Bracton, that where the duel, or great assise might follow; and as long as the duel, or great assise might be had; there, and so long, this essoin would lie; and that where, and when, either of those trials could not be had, it did not lie (b).

(a) Bract. 344.

(b) Ibid. 344. b.

This seems to be a better rule than to say, that the *essoin de malo lecti* lay in all writs of *præcipe*; for though it did lay in writs of right as long as they retained their primary nature; yet, as this might be changed by the form of counting, it became a less certain rule than the other. However, by one or the other of these rules it might easily be pronounced, whether both the *essoins de malo veniendi* and *de malo lecti* lay, and where only the former (*a*).

The *essoin de malo lecti* would not lie, even in the actions before-mentioned, for any of the following persons. Thus, it would not lie for a demandant, though he might have that *de malo veniendi*; but his pledges would be exacted if he made default in appearing: nor for an attorney; though, if an attorney was *languidus*, this was such an insurmountable impediment, that it would, from necessity, be admitted as an excuse, but not till the fourth day. It would not lie for a warrantor, till he had entered into the warranty; because then he might put himself on the duel, or great assise. It would not lie before the *justitiarum itinerantes*, for a person residing in the same county, because he might appoint an attorney (*b*); nor, for the same reason, where the tenant lived in London (*c*). Nor would it lie, where it was not preceded, mediately or immediately, by the *essoin de malo veniendi*; but an *essoin de malo lecti*, so cast, would be turned into that *de malo veniendi*, and would operate only as such (*d*).

This *essoin* ought to be made on the third day inclusively before the day given by the *essoniator* in the *essoin de malo veniendi*, and it ought to be cast by two persons, who were called, not *essoniators*, but *nuntii*, messengers; because they were sent to make an excuse, says Bracton, and not to *essoin*; for they received no day, nor did they swear to have a warrantor at a certain day to prove the *essoin*. This distinction between an *essoniator* and *nuntius* was very mate-

(*a*) Bract. 346. b. 347. (*b*) Ibid. 349. b. (*c*) Ibid. 350. (*d*) Ibid.

rial, and was known in other instances than this of the *essoïn de malo lecti*. An *essoniator* must come from the party; a *nuntius* might come either from the party, or of his own head, to inform the court of any impediment that prevented the party's attendance; and he would be heard so late as the fourth day, or later, down to the time of judgment on the default (a). It was by a *nuntius*, as well as by an *essoniator*, that many of the before-mentioned excuses for non-appearance used to be made.

When, therefore, the *nuntius* had delivered the excuse, the demandant had a writ *de faciendo videre* (b), directed to the sheriff, to this effect: *Mitte quatuor legales milites de comitatu tuo apud villam, &c. ad videndum utrùm infirmitas, quâ A. in curiâ nostrâ coram justitiariis nostris apud W. essoniavit se de malo lecti versus N. de placito terræ, sit languor vel non. Et si sit languor, tunc ponant ei diem à die visûs sui in unum annum et unum diem apud Turrim Londini, quòd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et si non sit languor, tunc ponat ei diem coram justitiariis nostris apud W. &c. quòd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et dic quatuor militibus illis quòd sint coram iisdem justitiariis, &c. ad terminum prædictum, ad testificandum visum suum, et quem diem ei posuerunt; et habeas ibi nomina militum, &c.* (c) This writ was to be faithfully and literally executed by the sheriff, and needs no other observation, except in that passage where a day is given at the Tower. Bracton says, this was done because the constable was always present there to receive the appearance of parties, who perhaps had a day to appear, when no justices were sitting on the bench at Westminster. However, if it happened that the justices were sitting, the party was still to keep his day before the

(a) Bract. 345.

(b) Ibid. 351.

(c) Ibid. 352. b.

constable; and the constable would give him a day, either before the justices of the bench, or, if the pleas were adjourned before the justices itinerant, then at the eyre (a).

If the four knights, or any of them, failed to appear, to make certificate of their view, process of attachment issued against them; for neither the view, nor certificate thereof, could be made by less than the four knights named; and therefore, if one of them died, a new writ issued for the sheriff to substitute another (b).

It was a rule, that after the *essoin de malo lecti* was received, the party should not *surgere*, as it was called, that is, not stir abroad, much less appear in court, without having *licentia surgendi*. This licence was to be obtained by sending some person to inform the justices, that the party essoined had recovered his health. The strictness with which the person essoined was to observe the *essoin*, as well before view as after judgment of *languor* was pronounced, is very singular. Bracton declares, that *decinctus, et sine braccis, et discalceatus se tenere debet in lecto*; yet he adds, *alicubi poterit indui vestimentis si voluerit*: however, if he went out of his chamber, he was not to go out of his house, under pain, if found abroad, of being arrested by the demandant, and of losing his land as a defaulter in breaking his *essoin*. Such arrest, indeed, ought properly to be made by the coroners, or some officer of the king's court. When the officer came with sufficient testimony of other good and lawful men to prove that he had broken his *essoin*, the party might endeavour to prove the contrary; he might say, *quòd cum esset tali die apud talem locum et in lecto, sicut ille cui languor adjudicatus, et in pace domini regis, venit ibi ipse talis petens, et nequiter, et IN FELONIA extraxit eum è domo suâ, et à lecto suo, et in roberia abstulit ei tantum, contra pacem domini regis; et sic offert, &c.* Upon this, a proceeding would commence, as in an ap-

(a) Bract. 353.

(b) Ibid. 354.

peal, and the matter would be determined by the duel, or inquisition; and according to the event of this trial, one of the parties would lose for ever; the tenant, *quia stultè surrexerit*; the demandant, because he maliciously drew the party essoined from his house; and as he meant to gain something by that proceeding, it was but reasonable, says Bracton, that he should likewise be a loser. If the tenant was arrested in a manifest act of breaking his essoin, the demandant might tacitly wave the default in this, as in other cases, by doing some act which shewed he did not mean to proceed on the default; as taking a day, *prece partium*, or the like (a).

Although before the view the party essoined might obtain *licentia surgendi*, yet afterwards, and when *languor* had been adjudged, he would be obliged to confine himself in the way above-mentioned, without any *licentia surgendi*, the justices having no jurisdiction to grant it; for the day now stood before the constable, whose duty it was to remit the plea to the justices (b). At the end of the year and a day, the party was to appear in person, or, if unable, he was to send a *responsalis*: no essoin could now be had, that *de malo lecti* being the last. If he was still unable to appear, there only remained for the justices to adjudge it *morbus sonticus*. Whatever was done, the constable was to make a record thereof, and transmit it to the justices, and give a day before them *in banco*. Thus ended the authority of the constable. If this essoin was made not in the king's but in the sheriff's court, then, instead of the Tower of London, some castle, or other certain place, within the county, was appointed for the appearance at the end of a year and a day (c). If the party did not keep the day appointed by the four knights, his land was taken by *parvum cape*, the same as if he had actually appeared, because

(a) Bract. 358.

(b) Ibid. 358, b.

(c) Ibid. 363.

the return of the knights was as a record, which the party essoined was not permitted to deny.

There was another essoin, which was considered as anomalous, and not at all within the course and rule by which other essoins were governed. This was the essoin *de malo villæ*; which was when the party had appeared, but was afterwards, before any answer to the suit, taken ill in the town where the court sat, and was unable to attend. This, like the essoin *de malo lecti*, was signified, not by an essoniator but a *nuntius*. The party was to send two different *nuntii* every day, for four days; on the fourth day the justices were to send four knights to the sick person, to accept an attorney from him, and if he was not to be found, he would be in default. This essoin *de malo villæ* did not lie in the county court, nor before the justices assigned to take any assise, or jury, nor in any case where the party was not to be expected till the fourth day (a).

We have seen what was the method of casting an essoin in order to save a default on the return of the writ of summons. We now come to speak more particularly of *defaults*, and their consequences. Defaults.

This, like most other subjects, is handled very fully by Bracton, with whose assistance we may attain a complete idea of this part of our ancient judicial proceedings (b).

If the tenant sent no essoin, nor appeared the first day, nor the second, third, nor fourth; then, provided the demandant *obtulit se* on either of those days before the fourth, the land would be taken into the king's hands; which caption was not followed by any severe penalty: for if the tenant appeared within fifteen days after the caption, and demanded the land in court *per plevinam*, and if at the day given, he could do away the default, the possession would be restored, or, as Bracton calls it, *reformed*. It seems, that if the tenant failed to appear the first day, and the demandant did appear; then, notwithstanding the tenant ap-

(a) Bract. 363. (b) Vid. ant. 114.

peared the day after, if he could not save his default, he would lose his seisin. If neither appeared the first day, and both on the second, one default was set against the other, and no advantage could be taken by the demandant; and so of the other days down to the fourth: the same, if the demandant appeared the first day, and the tenant not, and the tenant the second, but the demandant not. If they both appeared on the third, one default was set against the other (a).

During the four days, the demandant and tenant were allowed to shew excuses for their non-appearance; and the tenant might excuse himself even after the four days, if the ground of his excuse was such an impediment as really prevented his appearing, and he had sent a messenger to notify it within the four days. The grounds of excuse which the court would allow, were such as the following: He might say that he was put under restraint or imprisonment (provided it was not on account of any crime); that he fell among robbers, who bound and detained him, so as to prevent his sending a messenger; that he was stopped by flood, snow, frost, or tempest, by a broken bridge, or the loss of a boat, if there was no other safe passage.

If within the fourth day he neither came, nor sent some such excuse for not coming, the following entry was made: *A. obtulit se quarto die versus B. de placito quòd reddat ei tantum terræ, &c. Et B. non venit. Et summoneas, &c. Judicium, &c.* that the land should be taken into the king's hands; upon which there issued the writ of *Magnum Cape*. *Magnum Cape*, as it was called, to this effect: *Cape in manum nostram per visum legalium hominum, &c. quam A. in curiâ, &c. clamat ut jus suum versus talem pro defectu ipsius B. Et diem captionis scire facias justitiariis, &c. Et summoneas, &c. prædictum B. quòd sit coram iisdem, justitiariis, &c. inde responsurus et*

(a) Bract. 364. b.

ostensurus quare non fuit coram iisdem justitiariis, &c. sicut summonitus fuit; or, as the case might be, *quare non observavit diem sibi datum per essoniatorem* (a), &c. The writ of *magnum cape* was the process in all defaults before appearance in court; or, what amounted to the same thing, before the appointment of an attorney.

The day of the caption ought to be indorsed, in order to shew the time of fifteen days, within which the land might be demanded by plevin. The demand of plevin was to be entered upon the roll in this manner: *Talis petiit per talem tali die terram suam per plevinam, quæ capta fuit in manum domini regis, per defaultam quam fecit versus talem, coram justitiariis nostris, tali die.* Upon this no writ issued, nor was any thing done, except directing the party to keep the day given him in the writ of caption. If this plevin, and acceptance of the day, was done by the tenant himself, it seemed to preclude him from denying any summons on the caption; if by attorney, it was still left open to him to deny both the first and second summons. The effect of the caption was not to deprive the tenant of the occupation and use of the land; for if so, it would be rather, says Bracton, a disseisin than a distress: should, therefore, a church become vacant in the mean time, the presentation belonged to the tenant.

After this demand *per plevinam*, the land was not immediately replevied to the tenant before he appeared, but it was first seen whether the demandant would proceed on the cause of action, or on the default: if the former, it was a relinquishment of the default, which immediately became null, and the land was replevied (b): if the latter, it was not replevied till he had saved his default: in which if he failed, the seisin was adjudged to the demandant.

(a) Bract. 365.

(b) Ibid. 365. b.

Upon the summons in the *magnum cape* the tenant was allowed no essoin, nor had he the *dies rationabilis*, as it was called, that is, the indulgence of fifteen days; because, being in contempt, he deserved, according to Bracton, no more favour than in case of a disseisin. The summoners were to come, if necessary, to testify the summons. At the return of the *magnum cape*, if the tenant appeared, and the demandant made choice of proceeding on the default, the tenant might deny the summons (and sometimes the essoins *de malo veniendi* and *de malo lecti*, if any); and if the summons was testified by the summoners on examination, he must wage his law thereof; and upon that another day would be given to make his law, and pledges likewise must be found. Upon the day appointed for making his law, an essoin lay for both parties (*a*). If at length he made his law, he saved the default, but was obliged the same day to answer to the action, that no further delay might be had to the interval between waging and making law. If he failed in making his law, he lost, and the demandant recovered seisin of the land: further, the tenant, and, according to Bracton, the pledges likewise, were to be *in misericordia*.

If the tenant did not appear to the *magnum cape* on the first day, but on the second, third, or fourth, and the demandant came the first day and demanded judgment of both defaults, the tenant was required to defend both; unless he had precluded himself, with respect to the latter, by demanding plevin in person, as before mentioned; for if both were not removed, he would continue in default. Should the default not be saved in some of the aforesaid ways, judgment would be given for the demandant to recover seisin of the land taken by the *magnum cape* (*b*); upon which a writ of *seisinam habere facias* would issue to this

(*a*) Bract, 366.

(*b*) Ibid. 366. b.

effect: *Scias quòd A. in curiâ, &c. per considerationem curiæ recuperavit seisinam de tantâ terræ, &c. ut de jure suo, versus B. per defaultam ipsius B. Ideo tibi præcipimus quòd ipsi A. de prædictâ terrâ sine dilatione plenariam seisinam habere facias, &c.*

When the tenant had lost in this manner by default, there still remained a remedy for him; for he might recover in a writ of right at any time till the duel was waged, or the tenant had put himself on the great assise. Some thought it was open to him till the four knights were summoned; others, till the twelve were elected; but it was agreed, that no recovery could be had of land taken for default, after the twelve were elected. The tenant had a remedy likewise, if there had been any fraudulent contrivance in the demandant to prevent his being summoned; for when this was discovered, there would be neither a caption, nor judgment for a default; and if judgment was given, and any thing done thereon, it should be revoked. The tenant might recover likewise, if judgment of seisin had passed while he was abroad, and he had not been prevented, as before-mentioned, by the service of a summons. Bracton asks by what writ he should proceed in this last case; for neither the justices nor demandant had been guilty of any irregularity, as the summoners testified the summons to have been lawfully made? And he thought that the tenant might proceed by assise of novel disseisin; for he was in effect unjustly disseised, though by a judgment in court: and the demandant, says Bracton, in his answer to the assise (a), might call upon the king's court to warrant him; and then the court, which had been so deceived, would revoke and vacate the process and judgment.

As the judgment of seisin might be vacated and revoked, so might the default be saved before such judgment was passed; and this in various ways.

(a) Bract. 367.

Warrant *de*
servitio regis.

The principal of these was, the excuse which was before mentioned when we were speaking of essoins, namely, a warrant that he was in the king's service. This was signified by a writ to this effect. After reciting that he was in the king's service, it went on: *ideo vobis mandamus, quòd propter absentiam suam ad diem illum coram vobis non ponatur in defaultam, nec in aliquo sit perdens, quia diem illam ei warrantizamus.* A person might be protected by such a writ *de servitio regis* for a certain term, as from such a day to such a day; and they used to be obtained not only to save defaults in particular actions, but to save the default of appearance on any general summons, as that to appear before the justices at their eyre. As the king's service was a sufficient warrant to dispense with attendance in court; so was the being party to a suit in the superior court a sufficient excuse for not appearing in the county, court-baron, or other inferior court, and a writ used to issue to warrant him in such absence (a). The justices of the bench might send a writ to the justices itinerant, informing them that a party was attendant before them, and this would excuse his appearance in the eyre. The warrant *de servitio regis* could never be applied so as to enable the party making default to gain any thing, but merely to indemnify him for a loss; nor could it suspend a judgment in any matter *contra pacem regis*, as outlawry or the like. The other grounds upon which a tenant might get the judgment and execution revoked and vacated, were such as have been before stated as sufficient to save the default before judgment; such as imprisonment, being abroad before the summons, and other matters, which shewed the absence to be not voluntary, but of necessity.

The warrant *de servitio regis* was liable to be controverted. It might be shewn, that the party was at another

(a) Bract. 367, b.

place than that stated in the warrant; or, perhaps, even in court, but declining to enter an appearance at the time he was supposed by the writ to be *in servitio regis*. Bracton is of opinion, that such matter might be objected against the writ; though he admits, as on a former occasion, that if a representation was made to the king, and he persisted in continuing the warrant *de servitio*, there was no remedy (a).

Before judgment of seisin, a default might be done away by certain acts of the demandant which were construed as an implied renunciation of the fault; as if he accepted a *dies amoris*, or removed the plea, or cast an *esso*. When therefore he took a *dies amoris*, it was usually accompanied with a protestation, *quòd si amor se non capiat, salvus sit ei regressus ad defaultam*. A default might be released, either by a principal, an attorney, or a warrantor (b).

Thus far of defaults committed by the tenant. The law was nearly the same as to the demandant. Thus, if he made default and the tenant appeared, and the writ came, notwithstanding the demandant might offer himself at the fourth day, the tenant would go quit, and the demandant would be *in misericordia*. The demandant had the same excuses, which we have just shewn the tenant to have, the save his default. If neither the demandant nor writ came at the first day, and the tenant had essoined himself, then (c) although there was no authority for proceeding, yet Bracton says, he should not be entirely absolved, but *dicatur ei quòd eat sicut venit*: the same, if the demandant came, and neither the writ nor tenant. But if the demandant and tenant both came, or either had essoined himself, and the writ did not come, yet still *alius dies* should be given the parties, and the demandant, or his essoniator, would be commanded to cause the writ to be returned, as would likewise the sheriff. Again, if both parties were present, and the writ not returned, the tenant might demand the judg-

(a) Bract. 368. Vid. ant. 405. (b) Bract. 369. (c) Ibid. 369. b.

ment of the court, whether he ought to answer without a writ; and then he would have judgment, *quòd quietus recedat de brevi illo*.

If the writ was against more than one tenant, and one appeared, one cast an essoin, and one made default, *alius dies* would be given to the two former; but the other was to be proceeded against by *cape*, taking, if he was one of several parceners, only his portion of the land. If the same default happened where the demandants were parceners, then a writ would issue against the defaulter, summoning him *ad sequendum cum B. & C. participibus suis in placito quod est inter A. B. C. petentes et D, &c. et unde idem D. dicit quòd non vult iisdem B. & C. respondere sine prædicto A. &c.* If the defaulter did not appear at the return of this writ, nevertheless *B.* and *C.* might proceed, as for their part, if they pleased^(a). If husband and wife were demandants, or tenants, they were not considered as *participes*, but the same person; and the default of one, was the same as the default of both. If they were tenants, and the wife said her husband was dead, the judgment of seisin would be suspended, though she had no proof or *secta* to establish the fact; and a day would be given for the wife to prove the death, and the demandant the life; and it seems from Bracton, the mere dictum of the wife was, in this case, held sufficient to throw the *onus probandi* on the demandant.

We have before said, that upon a default, *Parvum cape.* the caption of the land, or other thing in question, was either by *magnum cape*, or *parvum cape*. It will be proper to examine more particularly, when the one and when the other was the proper remedy. Bracton lays it down as a general rule, that in all cases where a person might deny a summons *per legem*, (which he might before appearance) whether in the king's court, in the county, or court baron,

(a) Bract. 370.

there the caption should be by the *magnum cape*: the same, where on default to a writ of *pone* for removing a plea from the county to the king's court, though the tenant had in the county put himself on the great assise (a), and the four knights had been summoned, if the tenant made default to the writ of *pone*: so upon a removal from the court baron to the county, on account of the lord having *de recto defecisse*: so when all the pleas *in banco* were put *sine die*, on account of the *iter justitiariorum*, and were again re-summoned; and so in all cases of re-summons, except in the re-summons after a determination of bastardy in the ecclesiastical court, where the process was *parvum cape*; because there remained nothing further but judgment to be passed, which was not the case in the former instances, in all which the party might wage his law of non-summons.

If a person had once appeared in court, and had another day, so as that he could not deny the day and summons *per legem*, or if he had done any thing that furnished a presumption of his having been summoned, as making an attorney; in short, Bracton lays it down generally, that where a person had once appeared in court, and then made default, the caption should be by *parvum cape* (b). The distinction when the one or other of these writs should be used, seems very extraordinary, as there is no difference in the forms given by Bracton; nor does there seem to be any in the effect. Indeed, the latter is spoken of very slightly by that writer: he barely says, if the party did not come on the first day of the summons, on the *parvum cape*, he should be expected till the fourth; and on the fourth, the seisin should be adjudged to the demandant; and the tenant should have such recovery *quale habere debebit*; as if he might recover in the same manner, as had been before

(a) Bract. 370. b.

(b) Ibid. 371.

mentioned in case of a *magnum cape* (a). The whole of the learning which we have just been delivering respecting the *magnum cape*, seems to have been equally applicable to the *parvum cape*.

We have been speaking of the process by caption, as the regular process in actions real: it was likewise used in some mixt actions; which were both *in rem*, and *in personam*; where each party might be said to be *actor* and *reus*, though, in form of law, he alone was *actor* who brought the writ; as where the inheritance was divisible, either *ratione rei*, or *ratione personarum*, and one *particeps* brought a writ against another *pro rationabili parte*: so where land was *in communi* to persons who were not co-heirs, and one brought a writ for a division: so where a contest arose between neighbours for a boundary, and one brought a writ against the others *pro rationabilibus divisis*. For if in either of these three actions, or in any similar to them, a default happened, the process was the same as in real actions. But where two actions were contained in one writ, one being *in personam*, the other *in rem*; as where a person was summoned to shew *quo warranto* he held such land, and then the writ went on and said *quam dominus rex clamat esse eschatam suam*; in this case, as there would arise an appearance of claim to two sorts of process, Bracton thought, contrary to the opinion of some others, he should have that which carried most compulsion, namely, the process real by caption. Sometimes these two matters used to be separated; and then upon the writ which contained the *quo warranto*, or *quo jure*, the process was attachment, and not caption of the land (b).

Writ of *quo warranto*.

It may be here remarked, that by this simple writ of *quo warranto*, or *quo jure*, nothing could be recovered; for it was merely to call upon the

(a) Bract. 371. b.

(b) Ibid. 372.

tenant to shew by what title or warrant he held; and if he held by none at all, yet this gave no title to the demandant; but the demandant having made this discovery, must resort to another writ if he would recover the land (a). This writ of *quo warranto*, or *quo jure*, by which a man might be called upon to shew his title, enabled a litigious person to disturb the peace of any man's estate, whenever he pleased. How far the party, so called upon, was required to disclose his title, does not appear. Bracton seems to speak, as if it went no further than the title to possession, and the general point, whether by ²discent or purchase; and he seems to consider it as an ungracious and unhandsome proceeding. From the instance given by Bracton, it may be collected, that this writ of discovery lay only for the king (b).

After the essoins, and other delay, or at the first day of the summons, in the writ of right, ^{The count,} if the parties both appeared, the demandant was to propound his *intentio* (c), as it was called by Bracton, or *count*, and shew the form in which he meant to contest his claim. For this purpose, after the writ was read, the demandant or his advocate, in the presence of the justices on the bench, was to declare himself to this effect: *Hoc ostendit vobis A. quòd B. injustè ei deforceat tantum terræ cum pertinentiis in tali villâ, et ideo injustè, quòd quidam antecessor suus nomine C. fuit inde vestitus et seisitus in dominico suo, ut de fædo et in jure, tempore Henrici REGIS AVI DOMINI REGIS, [or TEMPORE REGIS Ricardi avunculi domini REGIS, or TEMPORE JOHANNIS REGIS PATRIS domini REGIS, or TEMPORE HENRICI regis qui nunc est] capiendo inde expletia ad valentiam quinq; solidorum, sicut in bladis, pratis, redditibus et aliis exitibus terræ; et de prædicto C. descendit justerræ illius, or as some expressed it DESCENDERE DEBUI* *cuidam D. ut filio et hæredi, et de*

(a) Bract. 372. b.

(b) Ibid.

(c) Bracton here borrows a term from the canon-law, as Glanville did the term *petitio* from the civil, to signify the *count*.

prædicto D. cuidam E. ut filio et hæredi, et de prædicto E. isti A. qui nunc petit, ut filio et hæredi. Et quòd tale sit jus suum, offert disrationare per corpus talis liberi hominis sui, vel alio modo, sicut curia consideraverit.

Certain parts of the *count* are worthy observation. Thus, we see, it was not sufficient barely to say, *peto tantam terram ut jus meum*, but this claim was to be grounded upon some suggestion that would demonstrate it, and shew in what manner and by what degrees the *jus* ought to descend to the demandant. Again, as the object of a writ of right was to recover as well the *jus possessionis* as the *jus proprietatis*, upon the seisin of a certain ancestor, it was not enough to say that such ancestor was seised *in dominico suo, ut de libero tenemento*, only, but that he was seised *in dominico suo, ut de fædo*, which included in it the *liberum tenementum*, and whole *jus possessionis*: nor was it enough to say that he was seised *in dominico suo, ut de fædo*, without adding *et jure*, which included in it the *jus proprietatis*. Nor would the concurrence of these two rights, those of possession and propriety, called *droit droit*, suffice, unless the ancestor named held the land *in dominico suo*; for if (a) it was *in servitio* only, he would fail, the writ of right being for a recovery *in dominico*; for the demandant counted on the seisin of the ancestor; and therefore the same seisin must be recovered which the ancestor had. Again, it was not sufficient that the ancestor was seised *in dominico suo, ut de fædo et jure*, unless he added, that *expletia cepit*. For though a person may have a *liberum tenementum* and *fædum* without the *expletia* in a possessory action, as was before shewn in the assise of novel disseisin and mortauncestor; yet the seisin of the *proprietas* was required not to be so momentary, but that there should be time to take the *expletia*; and therefore it was held, if there was no mention of *expletia*, the action would abate. Thus,

(a) Bract. 372. b.

if in fact no *expletia* were taken, and the party had suffered the time of bringing an assise of novel disseisin or mortauncestor to pass, and brought his writ of right, he would have no recovery.

Again, it was required that a certain time should be mentioned, that is, the time of some king, as *tempore talis regis*; for a writ of right, like other writs, had a time of limitation. Thus in the time of Glanville (*a*) it was not to exceed the time of Henry I. and now, by a late statute, it was not to exceed the time of king Henry II. the present king's grandfather; the reason given for which was, that beyond that period no one could succeed in making a proof, whatsoever right he might have: for a demandant could not make proof, says Bracton, but *de visu proprio*, or that of his father, who enjoined him to testify the fact, if any contest should arise upon it: and if Bracton wrote towards the close of this reign, the above period of limitation was perhaps as far as this sort of proof could well reach. When, therefore, a demandant mentioned the time of Henry I. he would fail, for want of proof.

If his ancestor happened not to be seised in the time of the king mentioned in the writ, Tender of the
demi-mark. although he was seised in another king's reign, yet the demandant might perhaps fail through this error, the same as if he had never been seised at all. But the issue to be tried by the great assise being, which of the parties had most right; the king's time did not properly come within the consideration of the recognitors; and the right between the parties might be decided with justice in favour of the demandant, although he had failed in the time of seisin mentioned in his count: when, therefore, the demandant had put himself on the great assise, and the tenant had suspicion that the ancestor was not really seised at the time mentioned in the count; as perhaps he was not born, or was dead at the time; he used to pray that the time of seisin might be inquired of by the recognitors: and to obtain the

(*a*) Vid. ant. 264.

favour of this extraordinary inquiry, it was the practice for the tenant to give something, *dare de suo*, as Bracton calls it; this being, probably, a remnant of the old custom of putting justice to sale; an abuse which was long permitted and made a gain of by our kings, and was at last provided against by a clause in the famous chapter of the Great Charter (a). To prevent the tenant taking advantage of an error in mentioning the time, the demandant was permitted to correct it, and speak of the time of another king; and this was allowed in any state of the cause till the tenant had answered, and put himself on the great assise, or defended himself by duel; but not afterwards could the question of time be moved by the tenant (b). The seisin was required to be *tempore pacis*; because, during wars, like those in the time of king John and the present king, many persons were violently disseised, and afterwards, in time of peace, were restored to their own property.

When the count was thus founded, the demandant was to offer to prove it, as was before mentioned; which offer was sometimes stated more fully: *Offert disrationare*

(a) Vid. ant. 249. It is to be lamented that our author, who has opened to the modern reader so many secrets of our old jurisprudence, should be less explicit on a point that has caused much difficulty amongst lawyers. The tender of the demi-mark, as it was afterwards called, is the practice here noticed; but this is done so shortly as to throw no light upon it; and, unhappily, the passage is so obscured by the use of a word, and that a technical one, in two senses, that it is difficult to make out any meaning at all. Having used the word *mentio* to express the naming of the time of the seisin in the writ, he afterwards uses it to signify the moving the question of seisin by the tenant: *Dat aliquando t. nens de suo pro habendâ mentione de tempore*. Perhaps some reason might be given in those times, to shew that the king might accept this tender of money for a judicial grace, without violating Magna Charta. This perhaps might be thought to stand on the same footing with the king's silver, which is still given *pro licentiâ concordandi*. The truth is, that the Charter only aimed at flagrant and enormous partiality when obtained by corruption, and not at such trifling payments as were made and accepted of course from every body, as a moderate recompence to the officers of the court for their labour and attendance.

(b) Bract. 373.

per corpus talis liberi hominis sui, et talis nomine, qui hoc paratus est disrationare per corpus suum, sicut ille qui hoc vidit, or de visu patris sui cui pater suus cùm esset agens in extremis injunxit in fide quâ filius patri tenebatur, quòd si inde loqui audiret (as before mentioned) quòd inde testis esset; et hoc per corpus suum disrationare sicut iliud quod pater suus vidit et audivit. If any of the above circumstances were omitted, and the proceeding had gone too far to correct the error, the demandant would lose his claim for him and his heirs for ever.

Another material part of the count was, the deducing the descent from the ancestor seised down to the demandant. This was plain and easy, when the descent was in the right line; but when it was necessary to go over to the transverse, or collateral line, it became more difficult: then, instead of deducing it from father to son, a transition must be made in this way: *Et quia idem talis obiit sine hærede de se, revertebatur jus terræ illius tali ut avunculo et hæredi, &c.* And in this it was necessary to observe, that the *stipes* resorted to did not exceed the time of limitation before mentioned. If a son died in the lifetime of his father, it was the opinion of some, that he need not be mentioned in the descent; but Bracton does not assent to this, laying it down as a reason, that no right descended to an heir from an ancestor, unless by the death of some heir; and he thought that such deceased heir should be noticed in this way: *Quòd de tali antecessore descendere debuit jus tali ut filio et hæredi, et de tali ei qui nunc petit (a) ut nepoti et hæredi;* so that no chasm would be left in the descent: for if that was allowed, then a son might be attainted of felony in his father's life, and, being left out of the computation of descent, the grandchildren would succeed immediately; which, as Bracton says, would be inconvenient,

(a) Bract. 374.

and against law. However, when the eldest son died in the life of his father, leaving no children, but leaving brothers, then it was not necessary to mention such eldest son in the computation of the descent, though the right ought to descend to him; as well because the other brothers were as near in degree to the seisin of the father as the brother who died, as because, upon his death, the eldest of the surviving brothers became next heir to the father; on which account the attainder of such elder brother, in the lifetime of the father, would not affect the other brothers, who were not heirs to him during the father's life.

Where an abbot, prior, or other incorporated person, sued a writ of right, in right of his church, grounded upon the seisin of a predecessor, there was no need to count from one abbot to another, naming the intermediate ones; because the corporation remained the same, notwithstanding the changes of the abbots (a). They therefore only said, *talis abbas, predecessor suus, fuit seisitus, &c.* If land was given to more than one jointly, the parties should all be named in the computation of the descent, thus: *Et unde A. B. C. D. fuerunt seisiti, &c. et ita quod tales mortui fuerunt sine hærede de se, accreverunt eorum partes superstitibus, et ita quod jus terræ illius descendit hæredibus eorum qui fuerunt superstites, scilicet talibus; et quia unus illorum, scilicet talis, obiit sine hærede de se, descendit totum jus tali, et de tali illi qui nunc petit, &c.*

If any one was omitted in the descent; if it commenced with one who never was in seisin; if there was any error in the person, or the name of any one mentioned in the descent; if any of those mentioned in the descent was a villain; in all these cases, the action would abate, and the demandant lose his suit (b).

(a) Bract, 374. b. Vid. ant. 397.

(b) Ibid. 375.

When the count was thus exhibited, it became the tenant to consider what defence ^{Defence.} he could make. The first point to be considered was, whether the court had jurisdiction of the cause; next, whether the parties to the writ were proper; and then, whether the writ was liable to any exception. The next consideration was, whether the tenant held all the land demanded, or only part, and how much: to ascertain this, the tenant might pray *a view*. When this was over, then the tenant was to answer to the merits of the cause, either by himself or attorney, unless there was some *warrantor* whom he should like to *vouch*. The nature of vouching to warranty, and the answers the tenant might make, we shall defer for the present, till we have inquired a little into the method of praying and making *a view*, and the cases in which it was allowed (a).

A view might be had either by the party ^{Of granting a view.} or by the jurors. Of the latter, something has already been said in the assise of novel disseisin. A view might be had also sometimes in inquisitions; and not only where it was a question for the recovery of property, but also where it was intirely upon a fact, as in cases of trespass. What we have now to say, will be confined to *a view* when prayed by the party, and granted for the purpose of enabling the court to pass a certain and precise judgment on the matter before them. In order to understand this, we shall first speak of cases where *a view* was not allowed; then of those where it was; and lastly, of the manner of making it.

In a plea *de proparte sororum*, if the demand of the *rationabilis pars* was by a writ of *nuper obiit*, that is, by stating that the demand was of a certain portion of the inheritance, of which their common ancestor *lately died seised*; the latter part of the allegation was construed to specify the parcel of land so accurately, as to supersede the

(a) Bract, 376.

necessity of a *view* (a); but if land was demanded by a writ of right *ut de proparte*, then a *view* was allowed. For the same reason a *view* was denied in dower, if brought for land of which the husband *obiit nuper seisitus*. If a manor was demanded without the *pertinentia*, no view was allowed, a manor being sufficiently defined by the name only: so if the demand was of the moiety of a manor undivided; because the demandant being ignorant which moiety belonged to the tenant, could not inform him of the particulars on taking the view. But if it was divided, and the *pertinentia* were claimed, there a view would be granted; and, in any case, if the manor was undivided, he might have a view of the whole. A view was denied to an *intruder*, if the thing in which the intrusion was made, was specified without the *pertinentia*; or if that was done, which was held to supersede the need of a view, as before mentioned; especially if the intrusion was so recent, as within a year or less. If a woman demanded dower of a manor, of which she was specially endowed, without naming the *pertinentia*, she could not have dower; so if she demanded *tertiam partem*; although she could not ascertain her third part, yet in this latter case, the tenant might have a view of the whole: however, if the woman replied that she demanded the third of that of which her husband *nuper obiit seisitus*, and that the tenant held the whole, no view would be allowed, for the reason above given. If the demand was made in an uncertain way, no view would be allowed; as demanding all the lands holden by the tenant in such a vill over and above ten acres (b): though here, as in a former case, he might have a view of the whole. When a tenant had had a view, no warrantor whom he introduced into the action could have it; the warrantor knowing by his charter what land he was to warrant, without the assistance of a view.

(a) Braet. 376. b.

(b) Ibid. 377.

If a view had been refused, or had not been prayed; yet when the duel was waged, and pledges given, the two champions might and ought to have a view, because, by law, they were to swear *de visu*; a day therefore used to be given them for that purpose. After land had been taken into the king's hands by default, it was not usual to allow a view; because the tenant, when he demanded it back *per plevinam*, must have ascertained it in the same manner as would be done by the demandant on a view; which, therefore, superseded the need of a view: however, for the same reason as was before given, the champions were to have a view after a default.

If the demand was made not of land, but of some right, as a right of advowson, of common, and the like; though these are invisible in themselves, yet as they are issuing out of land, the land to which they belonged might be ascertained either by view, or what amounted to a view. In cases of common it was sufficient, if the place was viewed by the jurors; and so it was in trespass, and in waste; for in a personal action a view might not be prayed by the party (a).

A view could be had in the following cases: of all lands demanded in a writ of right, or in any other writ in which the duel or the great assise might be had: in short, it lay wherever a corporeal thing was demanded, that could not be otherwise ascertained, either directly by the naming of it without any *pertinentia*, or indirectly by a description, as in a *nuper obiit* before mentioned; or by specifications that were adequate; as, *quam talis warrantizavit; talis tenet in eadem villā; talem quæ capta fuit in manus domini regis; talem quam talis tibi tradidit talem, de quâ disseisinam fecisti, talem quam tenes de dono talis*. It lay of incorporeal things, as in a writ of *quo warranto*; which writ, as

(a) Bract, 378.

has been before mentioned, was both *in rem* and *in personam*. It might be had of land out of which a rent issued, to which any one had common of pasture, or in respect of which suit of court was demanded. In all these cases, as well as the former, it might be had, unless the necessity was superseded by some sort of designation or description that was equivalent to it (a).

If the view was granted, the entry on the roll was to this effect: *A. petit versus B. tantam terram cum pertinentiis, &c. &c. Et B. venit, et petit visum de terrâ, unde, &c.* And then there issued a writ to this effect, directed to the sheriff: *Præcipimus tibi, quòd sine dilatione habere facias B. visum de tantâ terrâ cum pertinentiis in N. quam A. in curiâ nostrâ coram justitiariis nostris apud W. clamat, ut jus suum, versus prædictum B. Et dic quatuor militibus, ex illis qui visui illi interfuerint, quòd sint coram iisdem justitiariis nostris apud Westmonasterium, tali die, &c. ad testificandum visum illum; et habeas ibi nomina militum, et hoc breve, &c.* varying according to the form of the original writ (b); and then *dies datus est eisdem, &c.* On the *dies datus*, the demandant and tenant might both cast essoins; but whether they came or not, the sheriff was to command the four knights to appear and testify their view; and when this was once done, the record of such testification must be abided by. If no view had been made, and the tenant appeared, and shewed it, he might have another day. In making the view, the demandant ought to shew to the tenant, in all ways possible, the thing in demand, with its metes and bounds.

If the tenant objected, that the demandant had put in view more or less than what was contained in the writ, an inquisition of the country used to be made to find the truth (c). This inquisition sometimes consisted of four, five, or six persons, whom the parties named, together with

(a) Bract. 378. b.

(b) Ibid. 379.

(c) Ibid. 379. b.

certain of those who had made the view. For this purpose the following special *venire facias* would issue: *Præcipimus quòd venire facias coram justitiariis nostris, &c. A. servientem talis, & attornatum suum, in loquelâ quæ est inter eundem A. &c. de tantâ terrâ, &c. Et similiter cum eo B. C. D. E. super quos prædicti tales se posuerant, et præterea quatuor ex illis qui visui interfuerint, quem prædictus A. attornatus petentis fecit tenenti de prato, &c. ad certificandum præfatis justitiariis quid et quantum prati, &c. idem attornatus posuit in visu, et unde idem tenens dicit quòd non posuit in visu, nisi tantum, &c.*

When the tenant was thus informed of the quantity of land which the demandant claimed, he was better able to calculate his defence, whether to take it on himself by pleading any exception, or, if he had any warranty, to vouch a warrantor to defend for him (a).

If the tenant had no good cause of exception, either dilatory or peremptory, and had any one to vouch, it would be safer to vouch his warrantor to defend for him. This was to be done by the aid of the court, or not, according as the warrantor was, or was not, within the power of the tenant (b). A clause of warranty was usually inserted in every charter, whether made on the occasion of a donation, a sale, or exchange of any land or tenement: sometimes a warranty arose by reason of homage, without any charter at all. As a warranty was usually made for the warrantor and his heirs, to the donee and his heirs, the mutual tie continued on the heirs *in infinitum* on both sides; so it did on the assigns, and those who were *in loco hæredum*, as the chief lord, who came into seisin by reason of escheat (c). A tenant for life, as well as one in fee, and even one who held for term of years, might either vouch or be vouched. A husband might vouch his

(a) Bract. 380.

(b) Ibid.

(c) Ibid. 380. b.

wife ; and, in case of a gift made by her to him before marriage, if he lost, she was bound *in excambium* : the same, if the wife was impleaded of land given to her before marriage by the husband (a).

If a minor was vouched, the tenant was expected, at the time of vouching, to shew the deed containing the warranty. This was to take off the suspicion of its being meant for delay, the vouching of minors being often resorted to for no other purpose than that of delay. When the charter was shewn, and the question was upon a service, it was inquired, whether the minor's father, or any of his ancestors, was seised of the service *anno et die quo fuit vivus et mortuus* : if he was, then the minor was immediately to enter into the warranty, but the plea between the demandant and him was to remain *sine die* till he was of age ; for he was not obliged to answer, either to the warranty or the plea, till he was of age. But if the tenant had been enfeoffed of the land in question during the minority, the minor was to answer both to the warranty and the plea : and in order to know this, an inquisition would be made, whether it was an inheritance by descent or by purchase. What is said above of services applied also to homage (b).

Nature of warranty. The obligation of warranty that arose from homage might, as was before said, be proved without a deed. If the vouchee called for one, the tenant need only say, " You are bound to warranty, because *ego sum inde homo tuus*, and you have received my homage for this land, and are in seisin of my service, and my father and his ancestors *inde fuerunt homines antecessorum tuorum* ;" - of which he was to produce a sufficient *secta*, or some one who was ready, if necessary, to prove it *per corpus suum* : and if, upon the denial of the vouchee, this was afterwards proved before the justices, they would

(a) Bract. 381.

(b) Ibid. 381. b.

adjudge him to enter into the warranty. Although the tenant might at any time make the surrender of his tenement, yet the lord could not wave the homage, because by such means he might, at the expence of a small service, deprive the tenant of the claim of warranty, which depended upon the doing of homage. If the warranty was grounded on a fine and cyrographum, it is made a doubt by Bracton, whether a minor should not be bound to answer, though his ancestor was not seised *die et anno*, as above mentioned. But of this more hereafter.

A warranty was sometimes conceived so as to bind not only the person of the feoffor, but also a certain tenement. Thus in the deed of gift he might say, that he and his heirs would warrant the gift *ex tali tenemento quod tunc tenet*, to whomsoever that tenement might afterwards come; by virtue of which special warranty that tenement, in whatsoever hands, would be liable to go *in excambium* of the land warranted. But the law was so favourable to warranty, that, without such express specification, land was held to be tacitly bound by a warranty; and therefore, if a warrantor at the time of making his warranty (a) had sufficient to make good his warranty, the land he then had became bound by the warranty; and even if it went into the hands of the chief lord, or of the king, by escheat, Bracton holds (b) it to be liable to the warranty, *quia res cum onere transit ad quemcunque*.

The king, in point of law, was liable to warrant, the same as a common person; but he could not be vouched, because no summons could issue against him: instead, therefore, of vouching, the tenant ought to say, in the stile of a remonstrance, that *sine rege respondere non potest, et quòd habet chartam suam de donatione, per quam, si amitteret, rex ei teneretur ad excambium*. It seems, that such respect was paid to the king's charter, that an allegation thereof was held sufficient cause to delay the proceeding. To re-

(a) *Satis habuit.*

(b) Bract. 382.

medy this, it had been lately provided, that the king should never be named in this way, unless where he was bound *ad excambium* (a).

In vouching, the tenant ought to name the warrantor with all possible precision. Thus, if he was son as well as heir, he should be called son and heir. If many claimed to be heirs, they should be vouched disjunctively, *talis vel talis*, whoever of them was heir. If the heir was *in ventre*, and the wife had prayed to be put into possession *nomine ventris*, as seems to have been usual, then the tenant was at liberty either to name the person who was apparent heir, or him *in ventre*, stating in all such cases the special ground of ambiguity (b).

If a person was vouched who was in the power of the tenant, as a wife, children, or others under his authority, the tenant was not to have the assistance of the court; but if he did not produce the vouchee, he was to lose his land. If the vouchee was not in the realm, he was not within the reach of the king's writ, and therefore it would be in vain to pray the assistance of the court; and if the tenant did not produce such warrantor, he would lose his land: but if the person vouched was in Ireland, the king's writ used to issue to the justices there (c). If the vouchee resided within the power of the king's writ, and he could not be produced without the court's assistance, then there issued a writ to this effect, addressed to the sheriff: *Summoneas per bonos summonitores A. quòd sit coram justitiariis nostris, &c. tali die ad warrantizandum B. tantum terræ cum pertinentiis in tali villâ quam E. in eâdem curiâ coram iisdem justitiariis, &c. clamat ut jus suum versus prædictum B.*

(a) This provision is said by Bracton to be made *coram ipso rege in dedicatione abbathie de Hayles in præsentia novem episcoporum, et coram comite Richardo et aliis pluribus comitibus*. This, therefore, was an act of the legislature, and is one of those many acts of parliament which are now lost. The date of this provision is not mentioned.

(b) Bract. 332. b.

(c) Ibid. 395. b.

et unde idem B. in eâdem curiâ nostrâ coram iisdem iustitiariis nostris vocant ipsum A. ad warrantizandum versus prædictum E. &c.

The writ of summons *ad warrantizandum* always made mention of the sort of plea depending. If the warrantor was a minor, there was a writ of summons to the guardian to appear, and bring with him the heir. If an heir was vouched in respect of his mother's land, which was then in possession of his father as tenant *per legem Angliæ*, the warranty was not deferred, but a writ issued to him, expressed either to hear the judgment of the court on the warranty, or to warrant together with the heir (a).

At the return of the summons, the demandant, tenant, and warrantor, might all essoin themselves. If the demandant made default, and the tenant appeared, the tenant had judgment to go quit; if the tenant, then there was a *capiatur in manus domini regis*, as in common cases. If the demandant and tenant both appeared, and the warrantor made default, then a writ of *capias ad valentiam* issued to take as much land of the warrantor, as was equal to the value of the land in question. If the land of the warrantor was in another county, the sheriff of that county could not judge of the value of the land in question: to ascertain this, therefore, a writ first issued to the sheriff of the first county, commanding him by the oaths of twelve men of the vicinage *quòd extendi faciat, et appretiari*, the land in question; upon the return of which extent, they grounded a writ of *cape ad valentiam* to the sheriff in the foreign county (b). If a guardian made default, the *cape ad valentiam* issued against the lands of the minor: if either the tenant *per legem Angliæ* or the heir made default, the *cape ad valentiam* went against the maternal inheritance in the possession of the tenant *per legem*. If there was more than

(a) Bract, 383. b.

(b) Ibid. 284.

one warrantor, as in the case of parceners, the *cape ad valentiam* issued against all rateably; though if some appeared, they did not suffer by the default of the others, who were proceeded against separately (a).

The writ of *cape ad valentiam* contained in it likewise a summons; and if the warrantor after the caption did not appear to this summons neither the first, second, third, nor fourth day, and the demandant and tenant both appeared, the former against the latter, and the latter against the warrantor, then judgment was given that the demandant should recover (b) the land against the tenant, by default of the tenant, and the tenant an *excambium ad valentiam* out of the land of the warrantor. Upon this there issued a writ for the demandant, commanding the sheriff *quòd habere facias seisinam*; and another for the tenant *de excambio* against the warrantor (c); which latter was preceded by a writ of extent, if the land was in another county, as in the case of the *cape ad valentiam* before mentioned. If the warrantor had appeared, and afterwards made default, then there issued a *cape ad valentiam*, which was a *parvum cape*; and if he (d) failed to appear to the summons therein contained, the demandant had judgment against the tenant by default, and the tenant *ad valentiam* against the warrantor, as in the former case: and so of the person or persons making default, if the warrantor was more than one person; though if husband and wife were summoned, and one made default, it was the same as if both had so done, whether before appearance or after. If the warrantor afterwards appeared, but had no sufficient excuse to save his default in not appearing at the first, second, third, or fourth day, then, in like manner as in the former cases, the demandant had judgment against the tenant, and the tenant

(a) Bract. 385.

(b) *Recuperat terram suam versus B. per defaultam B. et B. in misericordia, et habeat de terra ipsius C. in loco competenti excambium ad valentiam.*

(c) Bract. 387. b.

(d) Ibid. 386.

over against the warrantor for an *excambium ad valentiam*, upon which issued writs of *habere facias seisinam* for both parties (a).

If the demandant and warrantor appeared and offered themselves, and the tenant was absent; then, if he had not entered into the warranty, he *statim recedat quietus de warrantia*, and a *parvum cape* would issue for the land in question; and if upon the return thereof the tenant did not appear, or could not save his default, he would lose his seisin. If the demandant made default, and the tenant and warrantor appeared and offered themselves, they both *recedant quieti de brevi illo*. When a person was vouched, who had no land in fee that might be taken into the king's hands, or by which he might be distrained, then a writ issued to the sheriff (b), *quòd habeat corpus*, to take the body.

When the demandant, tenant, and warrantor all appeared in court, the warrantor either entered into the warranty, or contended that he was not bound to warrant. If he voluntarily did the former, the original suit then proceeded between the demandant and warrantor, and the tenant might leave the court, till the plea between them was determined. The demandant was, therefore, to propound his count to the warrantor, in the same manner as he before had to the tenant, to which he was to answer, and defend the demandant's right by the duel, or great assise, unless he could plead some exception, or had a warrantor, whom he in his turn might call to defend him; and thus they might go on, one warrantor vouching another, till none was left to be vouched: and if the last warrantor lost, either by default or by judgment, he would be liable *ad excambium*, and so on from hand to hand to the tenant.

If the warrantors were C. D. and E. and E. had nothing wherewith an *excambium* could be made, and all the

(a) Bract. 386. b. (b) Ibid. 387.

others had sufficient, Bracton thought it hard that the tenant should go without an *excambium*; and therefore, in his opinion, it appeared equitable that *D.* should, notwithstanding, recompense *C.* and wait for better times, when *E.* could do the same by him; so that the writ of seisin would run: *Et quia E. nihil habet unde excambium facere possit ipsi D. ideo de terris ipsius D. in ballivâ tuâ eidem C. excambium ad valentiam prædictæ terræ, sine dilatione habere facias, donec idem E. aliquid habeat unde excambium facere potest, et illud idem excambium sine dilatione habere facias prædicto B. &c.* The same was also done, if any of the intermediate warrantors were unable to make an *excambium*. If the last warrantor could satisfy only in part, the remainder was to be supplied by the intermediate warrantors, observing the order in which they were vouched.

If a person had infeoffed several, at different times, and was vouched by them all, and lost, without having sufficient to make an *excambium* to each, they were to be satisfied according to the priority of their feoffment. This is supposing that judgments were given in all the pleas in one day; for if they were at different times (*a*), those who had the first judgment should be preferred; and if they exhausted the property of the warrantor, those who came after, says Bracton, must wait for better times; for the warrantor, if he had nothing, was not therefore discharged: but any thing which might afterwards come to him by descent from the ancestor by reason of whose warranty he was vouched, would be liable to be taken in *excambium*.

Should the person vouched, instead of entering voluntarily into the warranty, contend that he was not liable to be called upon, it lay with the tenant to make out the title by which he vouched.

(a) Bract. 388.

The grounds upon which warranty might be founded have already been considered in part; to those may be added the following: One great ground of warranty was a common gift of land by the words *do* or *dedi*; for it is laid down by Bracton, that, in all charters *de simplici donatione*, the tenant was intitled to a warranty from the donor and his heirs, unless some clause was inserted, specially declaring that the donor or his heirs should not be bound to warranty, or to make an *excambium*. A charter of confirmation, if it contained the word *do*, as it usually did, *do et confirmo*, in like manner bound to warranty; because it was in effect a *simplex donatio*, as well as a confirmation (a).

Many were the exceptions which might be stated by the person vouched to shew he was not bound to warrant. In the first place, he might avail himself of any error in the writ of warranty; but he could not have a view. If the warranty was grounded upon a charter, he might shew that the charter had such defects, as to be of no validity in law; of which more will be said hereafter. If no exception lay to the charter, he might except to the gift. Thus he might say, that the donee had not seisin in the life of the donor (c); that the donor was never seised; that the tenant was not heir to the feoffee; that he was not such an heir as is described in the original gift; that he was one of those persons who were expressly excepted in the warranty.

A warranty was with reason held not to bind a person to defend the feoffee against the feoffee's own tenant, but only against strangers who might claim any right before the first feoffment. If a person had recovered an *excambium*, where he had lost upon an act of his own, and

(a) Sometimes there was a special charter, expressing that the donor, notwithstanding the homage, should not be bound to warranty, or to make *excambium*.

(b) Bract. 389. b.

(c) Ibid. 390.

had no lawful title to recover against his feoffor, as in the foregoing case, the feoffor had a special writ to obtain restitution of the land so wrongfully recovered (*a*). Where a warranty was extended to the heirs and assigns, the assigns had an option, whether they would vouch the feoffee or the first feoffor (*b*).

If the warrantor happened to die, the principal action was not abated, as it was by the death of either the demandant or tenant; but the warranty was suspended for a time, as in the case of a minor. We have before seen, that where the ancestor died seised in fee, the minor was bound to answer the warranty; and Bracton lays it down positively, that if in support of the warranty the tenant produced a cyrographum, or fine made by the warrantor to the tenant, the warrantor was obliged to answer though a minor; although he need not answer if it was grounded on a common charter, on homage, or on service done. But yet, as to the demandant, he should have his privilege not to answer till he was of age; unless, indeed, where his ancestor did not die seised in fee (*c*). If the warrantor died at any time before judgment passed between him and the demandant, the plea did not abate, but the heir of the warrantor, whether a minor or not, was to be vouched; and if the warrantor had lost by judgment, but had not made an *excambium*, and died, the heir was to make the *excambium* without any other writ being sued (*d*).

There were instances where a person might enter into a warranty, though he was not vouched. This was not in defence of the tenant's right, but of his own: as if a person was tenant for life, or in dower of land which was to revert to the tenant in fee, and the tenant in fee perceived that such tenant permitted himself to be impleaded, and omitted to vouch the tenant in fee to defend; in

(*a*) Bract. 391. b.

(*b*) Ibid. 391.

(*c*) Ibid. 392.

(*d*) Ibid. 392. b.

such case, the reversioner, seeing the danger his title was in, might appear unvouched, and enter into the warranty to defend his own right. It was considered as the duty of every tenant for life, if impleaded for the land he held, to vouch his warrantor to defend (a).

When the person vouched after contesting the point, was adjudged to enter into the warranty, the demandant was to recommence the principal action against him, propounding his count, as against the tenant, with the additions which the change of persons and circumstances required; as, *quòd injustè intrat in warrantiam, quia terra de quâ agitur est jus suum, quia talis antecessor suus, &c.* The plea therefore went on between the demandant and warrantor; and this was the time for the warrantor to vouch over any person to warrant him; upon which a summons *ad warrantizandum* would issue similar to that before-mentioned. If he had none to vouch, or chose to vouch none, then he either defended the right and seisin of the demandant *per corpus liberi hominis*, or put himself upon the great assise, unless he had any exception to plead. Of these, some were common both to the tenant and warrantor; some belonged only to the tenant, and some only to the warrantor. No exceptions that had been made by the tenant, and over-ruled, nor any which he had waived, could be pleaded by the warrantor (b). If the warrantor succeeded either in his defence *per duellum*, or by the great assise, or in any exception he proposed, the tenant remained in his seisin, and the demandant was *in misericordiâ*: if he failed in either, the tenant lost his seisin, and the warrantor, as before mentioned, was bound *ad excambium*.

Respecting the *excambium*, or recompence in value, it is clearly and repeatedly laid down by Bracton, that no more could be demanded than the warrantor possessed by descent from the original warrantor; so that property *ex*

(a) Bract. 393. b.

(b) Ibid. 394.

parte maternâ was not liable to make good a warranty *ex parte paternâ*, and *vice versâ*. In no case, was land taken by purchase at all liable (a); nor was a person bound to warranty beyond the value of the land at the time of the donation. Judgment for the *excambium*, with the writ of seisin, and, where necessary, that of extent, have already been considered.

Before we dismiss the subject of warranty, it will be proper to consider two points, which were very intimately connected with it: these are the manner of proving a charter, and of proceeding by *warrantia chartæ*. If a charter was produced, and the person vouched denied the writing, the seal, and the gift, then the person producing it might maintain the gift to be lawful, and the charter to be valid; and, *inde ponit se super patriam, et testes in chartâ nominatos*. Upon this, a writ issued to the sheriff, commanding him to summon *A. B. C. testes in chartâ nominatos quam D. in curiâ nostrâ coram justitiariis nostris profert, &c. et præterea duodecim tam milites quàm alios legales, &c. ad recognoscendum super sacramentum suum, si prædictus, &c. (b)*. If the witnesses lived in different counties, different writs issued; but the *milites* always came from the county where the land lay.

Suppose the writing and seal were admitted, but the validity of the charter was questioned, because made while the donor was *non sanæ mentis*, or under age; or because extorted from him by force and fear while under restraint; or because obtained through deceit, being a feoffment in fee, when a term only was intended to be granted; in all these cases, it lay upon the person producing the charter to prove the contrary. Sometimes the inquiry was made by the witnesses alone, and sometimes by strangers without the witnesses, according as the parties

(a) Bract. 394. b.

(b) Ibid. 396.

chose (a). In the latter cases, there was always a clause in the writ directing that they should view the land. Some of these inquisitions were to be taken before the justices of the court where the suit depended; some before the sheriff, and the *custodes placitorum coronæ*. If the witnesses and recognitors did not appear in court at the day, another writ issued to the sheriff, beginning thus: *Bene recolimus ALIAS tibi præcipisse quòd, &c.* and concluding with this injunction and caution: *Et ita te habeas in hoc negotio, ne nos ad te graviter capere debeamus* (b). The writ of *venire* always stated the issue which was to be tried, and was, therefore, as various as the matter which might become the subject of such inquiry.

When the witnesses and recognitors appeared in court, the witnesses having taken their oath, declared that they were present when the gift was made, and that the charter of donation was read and heard, homage accepted, and seisin lawfully given to the donee in their presence, with all due solemnity. Upon this the charter was pronounced to be valid, and the gift good in law. If they said, they had only heard that such a charter was made, and homage accepted, but were actually present when seisin was given, and the donee entered; this also was held sufficient to prove the gift good: and if they said, they were present at all the other circumstances, but they knew nothing of the seisin, then the charter was proved, but the gift was invalid. If, says Bracton, the witnesses said they were present at the making of a note or memorandum to which both parties assented, this was held sufficient to prove the charter, though they were not present at the writing or signing of it.

If all the witnesses were dead, or out of the realm, so that none appeared to give testimony to the truth of the char-

(a) Bract. 396. b.

(b) Ibid. 397. b.

ter; then, of necessity, as in other cases, recourse must be had *ad patriam* (a).

Yet Bracton says, that a charter might be proved in other ways than *per testes et per patriam*. The seal might be compared with another seal of the same person, which had been produced and proved in court, or acknowledged by him. If, upon comparison of the seals, there appeared an agreement between them, this amounted to a proof of the deed, unless the charter carried upon the face of it some circumstances of manifest suspicion; as rasure in any part which contained the fact of the charter; for as to that which contained the law of it, that, as in writs, was not so material; for *jura*, says Bracton, *ubiq; scribi possunt*. A diversity of hands, or of ink, raised only slight presumptions, that might be done away by the testimony of the witness or the country (b).

Warrantia chartæ. The proceeding by *warrantia chartæ* was this: If a man was distrained by the chief lord to do greater services than were expressed in the charter of donation; this not being a plea concerning the right of the land itself, he could not have any remedy by vouching his warrantor, but he might summon him by the following writ: *Præcipe tali quòd sine dilatione WARRANTIZET tali tantum terræ, &c. quam tenet, et de eo tenere clamat, et unde CHARTAM suam habet, ut dicit. Et nisi fecerit, et talis fecerit te securum de clamore, &c.* Upon this there lay one *essoïn*; and if he neither appeared nor *essoïned* himself, there followed the process of attachment, the course of which will be particularly mentioned hereafter. When he appeared, he might contest the warranty, in the like manner as in case of a voucher. The above writ was the usual remedy where the tenant was vexed by the superior lord, who was paramount the warrantor; but where the warrantor exacted services, against the tenor of his own charter and warranty;

(a) Bract. 498.

(b) Ibid. 498. b.

some thought that a writ of *warrantia chartæ*, being for an injury, was not a proper remedy against his own lord, but that the proper remedy was by the writ *de recto de servitiis et consuetudinibus*, which would lead to the duel, or great assise: however, according to the opinion of Bracton, this action *de injuriâ* was the proper course against one, who had attempted to oppress and destroy the person whom he was bound by his own solemn engagement of warranty to defend (a).

Perhaps the tenant had no person whom he could vouch to warranty; or he might decline vouching, and would rather put in his exception or plea, stating such matter as would either defeat or suspend the demandant's action. The different exceptions that might be alleged by a tenant are discussed at length by Bracton, from whom may be collected a short system of pleading, as understood and practised in his time.

Pleas, or exceptions, as Bracton terms them, were of two kinds, dilatory and peremptory. Of pleading. Again, of dilatory pleas, some were peremptory as to the jurisdiction, but only dilatory as to the action. The order of stating exceptions, or of pleading, was first to the jurisdiction, next to the person of the plaintiff, then to the person of the defendant, next to the writ (b). Yet Bracton says, that some lawyers did not adhere to this order, but thought that they might plead a latter plea first, and with a protestation save the benefit of a former, which they might plead afterwards, if necessary. It was agreed, however, that a defendant might plead more than one dilatory plea; but he could plead only one that was peremptory as to the action. A plea might be proved many ways; by an instrument, *per patriam*, or by an inquisition, says Bracton, consisting of impartial unsuspected persons, being neither acquaintance (c) nor domestics of the party; for which

(a) Bract. 499.

(b) Ibid. 399.

(c) *Familiares et domestici.*

reason it could not be proved by a *secta*, which might consist of the party's acquaintance or domestics; and on that account a *secta* was never esteemed as a proof, but only as inducing a slight presumption, which might be done away by a proof to the contrary, and by a defence *per legem* (a).

Jurisdiction, or the authority of deciding between the parties to the suit, depended in general upon the maxim of the civil law, that *actor sequitur forum rei*; but this was controuled by a variety of exceptions. Thus matters relating to matrimony and testaments belonged to the spiritual court; matters of freehold and crime belonged to the king's courts. It was no uncommon thing, in these times, as has been shewn before, for a person to bind himself specially to be amesnable to a certain court, or such court as the plaintiff should please to sue in. This was a voluntary renunciation of jurisdiction that was binding on the party so contracting.

We have already seen the controversy which was maintained by the clergy in favour of the spiritual jurisdiction; and it seems, that in the time of Bracton many had no scruple to contend, that clerks were not bound to answer before a secular judge in any plea whatsoever, whether of freehold, contract, or crime: but that venerable author, who has been so unjustly accused of a prepossession in favour of the civil and canon law, declares it as his opinion, in opposition to such notions, that they were amesnable in all pleas civil or criminal, except only in the inflicting of a criminal sentence which affected life and limb; for there, though the secular judge had the cognisance, the execution was to be in the ordinary. Yet, as is observed by Bracton with some indignation, the practice was otherwise; for in capital offences the ordinary used to assume the cogni-

(a) Bract. 400. b.

sance, as well as the execution (*a*), notwithstanding he was bound by the canons not to judge in matters of blood (*b*).

When a suit was commenced in the spiritual court for a matter which was properly ^{Of prohibitions} cognisable at common law, the party so wrongfully sued might, as we have already seen, have a writ of prohibition to restrain the judge and party from proceeding further; the boundary, therefore, of these two jurisdictions is to be ascertained by a knowledge of the cases in which writs of prohibition were or were not allowed. This point was but slightly touched by Glanville, who confines what he says intirely to one or two writs (*c*); but the subject of prohibitions is treated very fully by Bracton.

We find that a prohibition lay for a patron, not only where the rectors litigated a question concerning the whole tithes of the church, but also where the suit was for a part of them, as low as to the sixth part of the value of the advowson, but not lower; any thing less than this being permitted to be determined finally by the spiritual judge (*d*). There are many writs of prohibition for the maintaining of the king's rights during the custody of the temporalities; the pope and his partizans endeavouring to encroach on these secular claims, either by refusing clerks who were presented, or by other marks of opposition (*e*). There is a writ of prohibition to stop a suit instituted against a bailiff of the king who had arrested a clerk for a felony or some other crime. If a suit was instituted in the ecclesiastical court to establish the legitimacy of children, with view to a claim to hold *per legem Angliæ*, a prohibition lay, because that court could not judge of legitimacy *quoad hæreditatem et successionem*, unless a plea was depending in the king's court, and bastardy was objected; and then the trial used to be remitted to the ecclesiastical judge, as

(*a*) Bract. 401. b.

(*b*) Ibid. 407.

(*c*) Vid. ant. 175:

(*d*) Bract. 402. b.

(*e*) Ibid. 403, 404.

has been already frequently mentioned. A prohibition also lay, if the ecclesiastical judge proceeded in an inquisition of bastardy, after the death of the plaintiff or defendant (a).

In the following cases, it is laid down by Bracton, that a prohibition would not lie to the spiritual court: in all spiritual matters, or those annexed to the spirituality, in matters matrimonial or testamentary, or where penance was to be enjoined. Thus, says Bracton, in a suit relating to any tenement *per pontifices Deo dedicatum*, and so held sacred, as abbies, priories, monasteries, and their cemeteries; or concerning things *quasi sacra*, because annexed to the spirituality, as lands, common, estovers, and the like given to a church, *in dotem*, as it was called, at the time of dedication; if the church was spoiled of these, and a suit was brought in the spiritual court for restitution, no prohibition lay; though this privilege was not allowed, if the lands were *in liberâ et purâ eleemosynâ*. In one place Bracton expresses himself as if a suit in the spiritual court, when for a liberty, a common, and the like, could be maintained only on a recent spoliation (b); though in another place he declares, that recent spoliation should be tried by assise (c).

A prohibition would lie to the following suits: to a suit *de catallis clericorum violenter ablatis*, or for tithes; or for the value of them, if they were sold (d); or on an obligation of surety for the purchase of tithes; or a promise of money *ob causam matrimonii*, not so if the promise was of a tenement; to a suit for a legacy, claiming it *ut debitum*; or for the legacy of a debt due to the testator, and acknowledged and proved to be such in his lifetime, because it so became a part of the testator's goods, which a debt, that had neither been proved nor confessed in his lifetime, or voluntarily confessed since, was not. Such a debt could only be established by suit at common law;

(a) Bract. 404. b. 405. (b) Ibid. 403. (c) Ibid. 406. (d) Ibid. 407.

till when it was no part of the goods, and so could not be bequeathed; it being a rule, first, that actions should not be bequeathed; secondly, that the ecclesiastical judge should not have cognisance of them; and thirdly, that executors should have no action for a debt which was not acknowledged (*a*) (that is, grounded upon a recognisance or judgment) in the life of the testator. If goods were bequeathed and sued for; the same of houses and edifices in some cities and towns which the testator had purchased, these being made *quasi catalla testatoris*, by his own disposition of them, (though it was otherwise in London, where prohibition would lie); if a *ususfructus* of land, as a term for years, was bequeathed; a *ususfructus* being only a chattel; in all the foregoing cases, no prohibition would lie, in the time of Bracton (*b*); for as the spiritual court was in unquestionable possession of causes matrimonial and testamentary, the abovementioned questions, as arising out of a testament or marriage, were thought naturally to belong to the same tribunal. *Illud quod principale est trahit ad se quod est accessorium.*

It is laid down very positively by Bracton, that in a matter purely temporal litigated between two laymen, the jurisdiction of the cause could not be altered by any privilege whatsoever; and he instances the privilege of those who were *cruce signati*, which he considers as an indulgence warranted by no law: he says, that no oath, no *fidei interpositio* (*c*), no voluntary renunciation of the parties could change the jurisdiction; as the renunciation of the party could have no effect beyond himself, it could not restrain the king in prohibiting a foreign jurisdiction from encroaching on his crown and dignity (*d*).

(*a*) *Recognitum.*

(*b*) Bract. 407. b.

(*c*) This was a pretence under which causes were drawn into the spiritual court, in the early times of our law, as has been shewn in the former part of this volume. Vid. ant. 164, 165.

(*d*) Bract. 408. b.

The jurisdiction of a cause depended either upon the parties and the cause of action together, or on the cause of action singly. Thus, if a clerk sued a layman, or a layman a clerk, in the ecclesiastical court, on a matter purely temporal, a prohibition lay: the same, if a clerk sued a clerk (*a*). In these cases it appears, that the cause of action was the principal ground of jurisdiction: but the cause of action would change its nature from spiritual to temporal; and so back again. Thus a lay chattel became spiritual, when tithed; and when the tithe was sold, it became again lay. Houses and other lay fees in cities and boroughs, if bequeathed by will, were, as has been seen, construed to be of a spiritual nature; but when the will was executed, they again became lay; and so of many others (*b*).

There were two writs of prohibition, one to the judge, another to the party; the former run thus: *Prohibemus vobis ne placitum teneatis in curiâ christianitatis, &c.* the latter, *Prohibemus tibi ne sequaris placitum in curiâ christianitatis, &c.* If the judge to whom the prohibition was directed thought it well founded, he would decree a *supersedeas* of the proceeding; if he doubted, it was usual to *consult* with the king's justices; to which *consultation* the justices would make answer by a writ, sometimes in their own name, and sometimes in the king's; as thus: *Dilecto in Christo tali. Inspectis literis vestris, quas nobis transmisistis, et plenius intellectis, (sine præjudicio melioris sententiæ) consultationi vestræ duximus respondendum, quòd si res ita se habet sicut in CONSULTATIONE vestrâ nobis exposuistis, videtur nobis quòd in causâ istâ bene potestis procedere, non obstante regiâ prohibitione* (*c*). If no such writ of consultation was sent, the prohibition remained in force.

It was not uncommon for the ecclesiastical judge to baffle a writ of prohibition by hurrying on the process

(*a*) Bract. 406.

(*b*) Ibid. 412.

(*c*) Ibid. 405. b. 406.

against the party bringing the writ, and entangling him in a sentence of excommunication. When a person had stood excommunicated for forty days, the bishop used to send a writ to the king intimating this, and praying the assistance of the secular arm; *invocantes, quòd minùs valet ecclesia in hác parte, dignetur regia supplere majestas*; the design of which was, that the party should be apprehended. But, upon suggestion of the fraud, the party might obtain another writ directed to the sheriff *de non capiendo*, which likewise commanded the sheriff to attach the clerical judge, that he might answer to the fraud. Any malicious application of the process of excommunication might be combated in the following manner. If a person was rightly excommunicated, and, having continued so for forty days, was imprisoned, and tendered surety for being forthcoming and answering to the suit, it ought, says Bracton, to be accepted; and accordingly a writ might be obtained, commanding the sheriff, that if the ordinary maliciously refused a sufficient surety, the sheriff himself should take it, and order the prisoner to be set at large (a).

If, instead of the above device, the judge ^{Attachment} and the party refused obedience to the writ, ^{sur prohibition.} they might both be attached to appear either *coram rege*, or his justices *de banco*, or the justices itinerant, to answer for their contempt. This writ of attachment differed somewhat from that used on the same occasion in Glanville's time (b): instead of repeating the prohibition, as it did then, it now began like other writs of attachment: *Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. talem ordinarium, quòd sit coram nobis, as the case might be, ostensurus quare tenuerit placitum in curiâ christianitatis de laico fædo ipsius A. in tali villâ contra prohibitionem nostram. Pone etiam per vadium et salvos plegios E. quòd tunc sit*

(a) Bract. 408, 409.

(b) Vid. ant. 175, 176.

ibi ostensurus quare secutus est idem placitum in eadem curiâ christianitatis contra prohibitionem nostram; et habeas ibi nomina plegiorum et hoc breve, &c. If the judge and the party lived in different counties, then there were separate writs for each. The process was the same as in other personal attachments (a), of which we shall speak more particularly hereafter.

When the parties on both sides appeared in court, the plaintiff stated his count, or declaration, or, as Bracton calls it, *intentio*, in this way: *Ego A. conqueror de B. quòd me injustè vexavit, et gravavit trahendo me in placitum in curiâ christianitatis de laico fædo meo, scilicet, &c. unde damnum ad valentiam, &c.* and to confirm and support his declaration he should add, that he shewed the writ of prohibition in full court, and that, notwithstanding this, they proceeded to examine witnesses, or to excommunication; and then he should conclude by producing a *secta*, consisting of two at least, and as many more as he could procure. If the *secta* disagreed in their testimony, it was the same as if none had been produced; but as this was only a failure of proof, and not of right, the defendant used, nevertheless, to be enjoined not to proceed in the ecclesiastical court. If the *secta* agreed, then the defendants were to answer; and this might be done several ways. They might plead, that it was a case of spiritual cognizance where no prohibition lay; or they might confess it to be temporal, but might, for plea to the plaintiff and his *secta*, say, that they did not proceed after the prohibition; or that no prohibition was tendered to them; and then each defendant might wage his law *duodecimâ manu*. When law was waged, and pledges given *de lege faciendâ*, a day was given to the parties for making their law; at which day they might cast an *essoïn*, and have another day by their *essoïners*; at

(a) Bract. 409.

which day if they did not come, nor cast an essoin, judgment was passed against them, and they were obliged to pay damages to the plaintiff.

If they appeared, they were to produce their compurgators, who, like the *secta*, might consist of their friends and acquaintance. The *compurgatores* not being required, any more than the *sectatores*, to be equally impartial with recognitors; it was sufficient if they were of good report, and in general deserving of credit; and they needed not be of the same rank and condition with the person producing them. The words in which *the law was to be made* were to pursue the form of the record: if they varied therein, the defendant stood convict; and, if a layman, was committed to jail, as guilty of a misdemeanor against the royal dignity, in the same manner, says Bracton, as if he had committed a crime of *læsa majestas*; if a clerk, then, in consideration of his orders, he was, according to the same authority, treated more mildly; though he does not mention the sort of penalty: the damages used to be taxed in both cases by the justices according to the nature of the case.

This is the account given by Bracton of the manner of proceeding on a writ of prohibition; and it may be presumed, that the proceeding in other personal writs was exactly similar. When Bracton comes to the subject of personal actions, he breaks off abruptly without carrying the reader through the whole proceeding, as he has here through the proceeding on a prohibition. This defect must be supplied, if possible, by what is to be picked up in other parts of his work, and particularly from the proceeding in prohibition which has just been related.

Thus far of questions relating to the juris-
diction of spiritual and temporal causes. Of jurisdiction.

Many other exceptions might be made to the jurisdiction of the judge. First, it was to be seen, whether he had a proper authority: and in order to ascertain this, it is di-

rected by Bracton, that the writ by which the justice was appointed, after reading the original writ, should be read, unless the original writ made mention of his judicial authority. If the judge delegated his authority to another, the proceeding before such delegated person would be *coram non judice*. Certain persons had peculiar privileges in judicial matters. Thus, the Hospitallers, Templars, and many others, had the privilege to be sued no where but *coram ipso rege, vel capitali justitiario*. The citizens of London were not to answer to any plea out of the city, except *de tenuris et contractibus forinsecis*. The barons of the cinque ports were to answer no where but *apud Shypwey* (a). It is said by Bracton (b), that if a judge was suspected of any partiality, favour, or malice, it ought to be a ground of exception; but this he seems to give as an opinion of his own; yet he lays it down as settled law, that the jurisdiction of a judge might be declined, upon a real cause stated; as for consanguinity to the plaintiff; or being his friend, or companion, or counsel, or pleader to the plaintiff, in the present or any other cause; or if he was an enemy to the defendant. All these are stated by Bracton as causes of exception to the judge exercising his jurisdiction to decide between the parties (c).

When the jurisdiction of the court had been controverted and established, then was the original writ to be read again, and the tenant was to make such exceptions as the law allowed against the form of the writ. The requisites to constitute a legal and regular writ were many. It must be adapted to the cause of action. Thus, says Bracton, if a *magnum breve de recto patens* was brought, when
 Abatement of it should be a *parvum breve clausum*, the writ
 the writ. would abate, though the action remained. Writs

(a) Bract. 411.

(b) This was a good exception in the canon law, under the name of *Refutatio*. Corv. Jus. Canon. 279.

(c) Bract. 411. b. 412.

should be brought in their proper order. Thus, where a person had a cause of action that would entitle him to more writs than one, and he brought a writ of right, he could not, generally speaking, afterwards bring an inferior writ to recover the possession; though there were instances where a demandant had gone so far as to pray a view in a writ of right, and afterwards was permitted to sustain an assise of novel disseisin. A writ failed, if it was grounded on the mode and quality of a fact, when it ought to be grounded on the fact itself; as the principal, says Bracton, should always be determined before the accessory. Thus, as has been observed in another place (*a*), a man disseised with violence should not bring a writ *quare vi et armis*, because it only went to the quality of the disseisin, and not to the recovery of the tenement disseised (*b*).

It was required that a writ should contain in it neither falsity nor error. It should, upon the face of it, appear free from all blemish. This seems to be required by Bracton more particularly in a writ patent; and whether it was patent or close, it should have no rasure: yet a difference was made between rasures. Thus, if it was in stating a fact, the writ failed, for names and facts should be stated with fidelity; and if such an error was made either by the chancellor, or by some clerk, or the sheriff, or the attorney, the person guilty would, according to Bracton, be *in misericordia* to the king for all his goods, and be liable to be punished as for forgery. If a false seal (*c*) was affixed, or even the true seal falsely applied, that is, to a false writ, this was considered as an offence of majesty; and the offender, if a layman, was punished capitally; if a clerk, he was degraded and rendered infamous (*d*). A writ abated, if obtained upon suggestion of falsehood, or the suppression of truth.

(*a*) Vid. ant. 338, 339.

(*b*) Bract. 413.

(*c*) *Tanquam falsarius.*

(*d*) Bract. 413. b.

If the demandant or tenant died, the writ abated, and the action too; but if they were more than one, as parcellers having one right, then, though the writ abated, yet the action survived (*a*). If there was any error in the names or persons, in the county, or vill, the writ abated. If the tenant held less than the demandant claimed, the writ failed; not so if he held more. If pending one action the demandant brought another writ for the same cause of action, the second writ abated. We have before said, that the writ abated if the demandant died; it was the same, if being a bishop, or an abbot, or the like, he was deposed; but not if such bishop, abbot, or the like, were tenant in the action; for then the action would only be suspended till a successor was appointed; especially if the action was civil, and not penal (*b*): if it was both civil and penal, the action would hold both *ad pœnam* and *ad restitutionem*, as long as he lived; but if he died, whether before or after deposition, the penalty was extinguished with the person; yet an action would lie against the successor for restitution by another writ. A personal writ abated by the death of the tenant, whether such death was civil or natural, but the action survived. A civil death followed upon an entry into religion; and if this was procured fraudulently after the purchase of the writ, it seems it would not abate the writ. If the demandant in his declaration exceeded the limit of the writ, as on a writ of possession to count for the right, the writ abated.

In short, almost all exceptions, says Bracton, which could be alleged, might be properly ranked among pleas to the writ; because, if they went to the action, when the action was determined, the writ was, of course, at an end: whether the action was abated, postponed, or suspended, so was the writ. It was the opinion of some, that all pleas to the writ must be propounded, *simul et semel*, in one

(*a*) Bract. 414.

(*b*) Ibid. 414. b.

day (a). When the writ was abated by reason of any defect or error, and such defect or error was corrected, it was considered as the same writ and the same action, though it was actually another piece of parchment and another seal; and therefore neither the declaration or count, nor the attorney, needed be changed (b).

If the writ was open to no exception, then ^{Pleas to the} the defendant was to see if there was any ^{person.} against the person of the plaintiff, so as that he could not at all, or at least not at that time, make his demand. Thus, it might be urged, that the demandant was a *servus*, or a bastard, or *sæculo mortuus*; that he was mad, and *non sanæ mentis*; or born deaf and dumb; or a leper; that he, or some ancestor, had been attainted of felony; that he was a minor. If a person was appealed of felony, he could not bring a civil suit till he had defended himself; nor could a defendant, under such circumstances, be bound to answer. It was a good plea to say, that the plaintiff was in confederacy with the king's enemies, or was in allegiance to the king of France; or to say, that he was excommunicated (c). It might be said, that the demandant had no right, but as parcener with another; or in right of his wife, so as he could no more sue without her than she without him (d). Of some of these pleas we shall now speak more particularly.

The plea of bastardy was peremptory; for, if proved, it excluded the demandant for ever from making any claim. It was always required, that the special matters should be stated in the plea; otherwise, there would be an obscurity and doubt, whether the bastardy should be tried by the ecclesiastical court, or not. Thus, having said *nihil juris habes in terrâ petitâ quia bastardus es*, it should go on,

(a) Bract. 415.

(b) Ibid. 415. b.

(c) The leprosy of the mind, as Bracton calls it, like that of the body, as it excluded the unhappy object from the communion of men, so it precluded him from doing any lawful act.

(d) Bract. 415. b. 416.

quia pater tuus nunquam desponsavit matrem tuam; or thus, quia inter patrem tuam et matrem tuam contractum fuit matrimonium illegitimum ex quo prius contraxit cum quâdam, quæ vixit tempore, quando contraxit cum matre tuâ; in both which it appears, that inasmuch as the question arose upon the marriage, it must be tried by the ecclesiastical court. But if it was thus, quia natus fuisti per tantum tempus ante sponsalia vel matrimonium contractum inter patrem tuum et matrem tuam; then in such case, as the marriage was admitted on both sides, it is the opinion of Bracton, that the question, whether born before marriage or after (a), might very well be enquired in the king's court.

We have before seen what scruples had been raised by the ecclesiastics upon this question of *natus ante matrimonium*, and what a positive declaration was made by the king and barons in the statute of Merton, passed in the twentieth year of this reign (b). The matter was not suffered to rest there. We are told, that in the same year the king held a council, consisting of several bishops and lords, and that it was agreed by them all, that whenever the issue of *natus ante matrimonium* arose in the king's courts, the plea should be transmitted to the ordinary; and that an inquisition being made by him in precise words, *utrùm talis natus sit ante matrimonium vel post*, he should send his answer to the king's court in the same words precisely, without any cavil (c): that in taking such inquisition, all appeal should cease, as in other inquisitions of bastardy transmitted to the ordinary; and particularly, if there should be need of an appeal, that it should not be made out of the kingdom. It was commanded that this should be the practice in future. This regulation intirely precluded the ordinary from giving any judgment on the legitimacy, and confined him to the single enquiry of the fact, which he

(a) Bract. 416.

(b) Vid. ant. 266.

(c) *Sine aliquâ cavillatione.*

was required to certify in the very terms of the issue, leaving the king's judges to make their own conclusion upon it; which is precisely what Glanville lays down as the law upon this subject(a). But, before this provision of the council, a practice had obtained, as we have just said, of trying this special question of bastardy in the king's court. Thus, in the eleventh year of this king, in a writ of mortancestor, the jurors found that the demandant was not the next heir, being born in adultery before marriage. It seems to have been considered as in the election of the king's judges, whether they would send such an inquisition to be made in the ecclesiastical court, or would try the question in their own(b).

It is not, however, improbable, that it depended upon the form of the issue, which court should be resorted to, or finally relied on, for the trial of this question; for if the demandant replied generally *quòd legitimus*, without answering to the special matter, and this obscure issue was sent to the ecclesiastical court, that court would probably certify generally *quòd legitimus*; but this would be such a failure in the ecclesiastical court, as to induce the judges to cause an inquisition to be made in the king's court on the special matter: the same, if the reply had met the special matter, and the ecclesiastical court had certified generally *quòd legitimus*; though Bracton seems to think, that such a general and obscure reply to the special cause of bastardy would pass for no reply at all, and that the demandant would be barred for want of a replication; and that, if he was a defendant, there would, in like manner, be judgment against him for want of a defence.

There were some questions of bastardy that would not, under any pretence, be transmitted to the ecclesiastical judge; as in case of a posthumous(c) or a supposi-

(a) Vid. ant. 113.

(b) Bract. 417.

(c) Ibid. 417.

titious child; or where the father had been absent from the mother abroad, so as to leave no presumption of legitimacy, which, however, depended upon the distance and the probability of access (*a*). The plea of bastardy would not lie between persons of the same blood, in a possessory action, (though it might between strangers), nor in a plea *de consanguinitate*, any more than in an *assisa mortis antecessoris*, because a question of bastardy between such parties was always upon the mere right, if the inheritance descended from a common ancestor; and so a question of right would be agitated in an action grounded only upon the possession. It might be urged that such a plea was good, by the above rule, because a bastard was in truth a mere stranger as to the true heir; yet Bracton thought not; for it was at least doubtful whether he was not legitimate.

When bastardy was pleaded, and the other party maintained his legitimacy, it seems there was no rule, whether the bastardy or the legitimacy should be proved, except this, that the party who was *extra seisinam* should prove his plea, the person who was in seisin having no need, as Bracton says, to make out either one or the other; and this was the governing rule, whether the plea came from the tenant or demandant (*b*): so that in this issue the point to be proved was, sometimes the legitimacy, and sometimes the bastardy, according as the *onus probandi* was imposed by the above rule.

Writ to the ordinary. The writ to the ordinary in cases of bastardy differed very little from that used in the time of Glanville. It recited that a suit was commenced, and that bastardy was objected to one of the parties: *Et ideo vobis mandamus, quòd, convocatis coram vobis convocandis, rei veritatem inde diligenter inquiratis, videlicet,*

(*a*) Bract. 418.

(*b*) Ibid. 418. b.

utrum A. &c. Et inquisitionem, quam inde feceritis, scire faciatis nobis, vel justitiariis nostris talibus per literas vestras patentes. Teste, &c. and so, *mutatis mutandis*, according to the special cause of bastardy. There was this difference between the writ of *natus ante matrimonium* in the time of Glanville, and that now in use, that they no longer inserted these words, *et quoniam hujusmodi inquisitio pertinet ad forum ecclesiasticum*; an alteration which probably had taken place since the statute of Merton, and the abovementioned provision of the council on that subject. The same was observed if the ordinary was directed, as he sometimes was, to inquire concerning the legitimacy of a posthumous child; both these questions being triable as well at common law as in the spiritual court. But the above form of words was retained in all cases that were purely of ecclesiastical cognisance.

When the writ was sent to the ordinary, the plea remained *sine die* in the king's court till the inquisition was returned. The ordinary was to proceed to make inquisition in the presence of the parties, if they chose it^(a), and when made, there lay no appeal. When the inquisition was returned, the plea and the other party were summoned. The effect of a legitimacy proved in this way, if confirmed by a judgment in the king's court, was, that the party became legitimate against all the world, unless any fraud could be proved in the method of proving it, and in the inquisition. A fraudulent inquisition might be obtained in this way. A demandant might bring several writs for recovery of land, and procure one of the tenants to object bastardy, and to suffer an inquisition to pass in his favour, for want of contesting the proofs of legitimacy. Legitimacy, when regularly proved, was good against all the world, and the heir of such person was likewise entitled

(a) Bract. 419.

to the benefit of it. It was a rule, that no person's legitimacy could be questioned after his death by plea pleaded, as he could not, says Bracton, make an answer to it; but, notwithstanding, it might be inquired *per patriam* whether such person was a bastard or not, in the same manner as the question whether a person held in free tenure or in villenage; although it could not be inquired, after his death, concerning the personal condition of such person (a). When profession, or entering into a religious life, was objected, this issue was always transmitted to the inquiry of the spiritual court (b).

Of minority. The plea of minority of the demandant was

only a dilatory exception, that did not abate the writ, but suspended the action till he came of age, at which time the plea would be resummoned. There were some actions which a minor might bring, and some which he might not. A minor might demand his own seisin by assise of novel disseisin, and the seisin of his ancestor by *assisa mortis antecessoris*; but when he had so recovered, he was not obliged to answer either for the possession or right, till he was of age: yet he could not demand land in free socage of his ancestor's seisin, in a writ of right, before he was fourteen years old, nor *feudum militare* till he was completely twenty-one years old. On the other hand, a minor was bound to answer as well upon the right as upon the possession, if he had been enfeoffed of the land in question during his minority; and would have all the privileges of essoins, vouching, and the like, except that he could not appoint an attorney, and consequently he could not have the essoin *de malo lecti*. A minor was obliged to answer for a fact and injury of his own, in a civil or criminal suit. Thus, he was liable to an assise of novel disseisin, and to a suit for dower. But where a grandmother had neglected for ten, twenty, or

(a) Bract, 420.

(b) Ibid, 422. b.

thirty years, during the life of her son, to demand dower, and brought a writ against the grandson, she was obliged to wait till he was of age, on account of the probability that she had agreed with her son and released the claim^(a).

A minor was obliged to answer in a matter that concerned the king. For such purpose, an inquisition might be made, whether his ancestor died seised *ut de fædo*, without prejudicing the heir. A minor must answer to a fine, if pleaded; but if he was vouched by virtue of a fine, he need not answer; though he would be obliged to answer in *warrantia cartæ*. A minor must answer in *assisa mortis antecessoris*, and in every other plea concerning any thing of which his ancestor did not die seised *in dominico ut de fædo*, but concerning nothing of which he died seised *in dominico ut de fædo*. If a minor lost by assise in a writ of possession, he might, when of age, recover in a writ of right. A minor must answer as well on the fact of another as on his own, so as to make restitution, though not *quoad pœnam*; as when a writ of entry was brought immediately after the death of the ancestor who had committed disseisin. A singular instance, where the privilege of infancy was dispensed with, is mentioned by Bracton. A man bound himself and his heirs to answer whether they were of age or not. This obligation was made in and by the advice of the court, and the heir was adjudged to answer, though a minor.

In the case of inquisitions taken for the king, a minor might have a writ to the following effect, to save himself from being affected thereby. *Rex vic. salutem. Pracipimus tibi, quòd non implacites vel implacitari permittas A. qui est infra ætatem, ut dicitur, de libero tenemento suo in villa, &c. donec idem A. sit ætatis quòd possit et debeat*

(a) Bract. 421. b. 422 .

secundum legem et consuetudinem Angliæ de tenemento respondere (a). If a minor was vouched to warranty in the county, he might have the following writ to the sheriff: *Præcipimus tibi, quòd non permittas quòd A. implacitet B. de tantâ terrâ cum pertinentiis in tali villâ, unde idem A. trahit ad warrantum C. qui est infra ætatem, et warrantus ejus esse debet, ut dicit, donec idem C. sit talis plenæ ætatis quòd possit et debeat secundum legem et consuetudinem Angliæ terram warrantizare.*

If there were more demandants than one, as parceners, and one was a minor, it would be a good plea against all: the same, if parceners were tenants. So if a man seised in right of his wife was tenant to a writ, together with her, and she was within age, the plea against both would remain *sine die* till she was of age: not so if the husband was a minor; because, says Bracton, a woman might, by contriving such a marriage, defeat suits against her respecting her own lands. If the husband and wife were demandants, and she was a minor, and married before the writ purchased, the plea would remain *quousque*: if she married after, the writ abated, should the tenant so please, or the action was suspended till she was of age (b).

Such consideration was shewn to the feeble condition of a minor, that his estate, whether in services or tenements, descended to him from his ancestor, who was *peaceably seised* thereof *anno et die quo vivus, et mortuus fuit*, was not to be called in question till he was of full age. So, on the other hand, if a minor demanded services that were not due to him, and the tenants alleged (c) *quietanciam quo die et anno antecessor vivus et mortuus*, they need not answer till he was of age. A minor was not obliged to answer to any

(a) Bract. 422. (b) Ibid. 423. (c) *Quietanciam*, peaceable seisin.

charta till he was of age (*a*). This held not only in services or tenements, but in rights and liberties, by which the tenements of others were affected; as a liberty to make a road, build a mill, and the like. Although he did not actually use these easements, yet he was considered in possession thereof till ejected or disseised; and such a seisin would descend upon the heir, whose estate therein was not to be changed during his minority (*b*).

To a plea of minority in a writ of right, or *assisa mortis antecessoris* against a guardian, the demandant might reply, that he was of full age, as appeared by all his lords having restored his inheritances to him; or he might say, he had proved himself of age, either by inquisition *per patriam*, or before certain justices. To this it might be rejoined, that his inheritances were restored to him *per fraudem*; or that the jurors had sworn falsely, or that the justices had been deceived. The only sufficient and complete proof of full age was, that by the parents, and the examination of witnesses; all others, as inspection and the like, were held only to induce a presumption: yet, says Bracton, if the justices, upon sight of the person, judging from his stature and other circumstances, pronounced him to be of age, his age was confirmed by judgment, and could not be again disputed. Should the justices hesitate to pronounce an opinion, then recourse was, of necessity, had *ad probationem patriæ et parentum*. This, says Bracton, was to be done by twelve lawful men, or more, if necessary, some of whom were to be *ex parentelâ* of the person who said he was of age, the rest were to be strangers: all these were to be unsuspected, and were to declare the truth, upon their oaths (*c*). Another presumption of full age was, a conclusion arising from the party having brought actions as a person of full age, which was an admission that would preclude him from pleading his infancy to any action brought against himself; whereas a proof of full

(*a*) Bract. 423.

(*b*) Ibid. 424.

(*c*) Ibid. 424. b.

age by jurors, according to some opinions, was not held conclusive against other persons, because the jurors might perhaps, swear falsely.

If the minor was demandant, the proof was made without any resummons; but if he was tenant, and pleaded his minority, then the proof was not made till after a resummons. This was sued out by the demandant; and on the return if there was any doubt, then they entered upon the proof in the way before mentioned (a).

Excommuni- The excommunication of the demandant
cation. was only a dilatory plea. This was to be proved by the letter of the ordinary, or some judge delegated by him with proper authority. To this exception it might be replied, that he was absolved upon an appeal, or that the cause of his excommunication was, his not obeying the ecclesiastical judge in a question of lay fee, and the like (b). We have seen before, that when a person had been excommunicated for forty days the ordinary used to certify this contempt, and, upon receipt of the bishop's letter, the chancellor would issue a writ to the following effect, directed to the sheriff: *Significavit nobis venerabilis pater N. per literas suas patentes, quòd A. ob manifestam contumaciam suam excommunicatus est, nec se vult per censuram ecclesiasticam justiciari. Quia verò potestas regia sacrosanctæ ecclesiæ in querelis suis deesse non debet, tibi præcipimus, quòd prædictum A. per corpus suum (secundum consuetudinem Angliæ) justicies, donec sacrosanctæ ecclesiæ tam de contemptu quàm de injuriâ ei illatâ fuerit satisfactum. Teste, &c.* When the person was taken, and had satisfied the ecclesiastical judge, he might be discharged, at the command of the bishop, by the following writ to the sheriff: *Quia venerabilis pater N. episcopus significavit nobis, quòd A. quantum ad mandatum suum à te capi, et per corpus suum tanquam contemnentem claves*

(a) Bract, 426.

(b) Ibid. 426. b.

ecclesiæ justiciari præceperimus, beneficium absolutionis impendit, tibi præcipimus quoddam prisonam nostram quam detinetur ipsum deliberari facias quietum, &c. As no one could be taken, so none could be discharged, but by the command of the bishop; the law not giving such credit to an archdeacon, or other delegated judge; because, says Bracton, *rex in episcopos coercionem habet propter baroniam*: nor was the party to be discharged till he had satisfied the ecclesiastical judge, unless where an excommunication was obtained by a false suggestion of the ordinary himself, or the malice of an adversary, in order to preclude the party from the right to bring an action; in which case a writ used to issue to the sheriff, reciting the fraud, and commanding him to discharge the injured person upon sureties, *nisi captus fuerit alia occasione, quare deliberari non debeat*. We have before seen that where such malicious proceeding was apprehended, the party might be beforehand with the ordinary, by the writ *de non capiendo* (a).

Participes were either co-heirs or *parceners*, or such as were afterwards better known by the name of *jointenants*. If an action was brought by one of several *parceners*, it might be pleaded, *quoddam non teneor ad hoc breve respondere, quia si jus haberes, participes habes, qui tantundem juris haberent in se quantum et vos, scilicet A. et B.* To this it might be replied, that all who could claim any right were named in the writ (b), and no right was in *A.* because he was a bastard; nor in *B.* because, born of a villain, although his mother, from whom he claimed, was free: he might say, that the other *parcener* was in ligeance to the king of France, or that his ancestor committed felony, and many other matters might be replied to shew that the *parceners* not named had no right (c). If *parceners* were all of capacity to sue, and some brought a writ, and recovered without naming the others, Bracton

(a) Bract, 427.

(b) Ibid, 428. j

(c) Ibid. 428. b.

says, it was the duty of the judge to take care that the interest of those not named, suffered no injury by this fraud. If they were all named, and some declined proceeding, yet the writ would stand good, and those who did not appear would be summoned, *quòd sint ad sequendum simul* with the other parceners, thus: *Summone per bonos sum. A. et B. quòd sint coram justitiariis nostris die, &c. et loco, &c. ad sequendum cum C. et D. de tantâ terrâ unde prædicti C. et D. clamant duas partes versus E. ut rationabilem partem suam, quæ eos contingit de hæreditate R. cujus hæredes ipsi sunt, et unde prædictus E. dicit quòd non vult prædictis C. et D. respondere sine prædictis A. et B. ut dicit; et habeas ibi, &c. (a)*

If the writ was brought against one parcener, he might, in like manner, plead this to the writ. But there was some difference, whether the inheritance was divided or not: if not, and they held in common, each had the same right to the whole; not indeed to himself, but only in common with the others; or, as they expressed it, *totum tenet, et nihil tenet, scilicet totum in communi, et nihil separatim per se*. If the inheritance had been divided, and each held *pro parte*, the other parceners need not be named: yet, on the other hand, says Bracton, the tenant was not bound to answer without his parceners, and in prudence he ought not; for if he did, and he lost the land, he could have no *regressum* against his parceners to obtain a contribution. The tenant therefore, if he pleased, might have a writ to summon them: *Summone, &c. quòd sint coram justitiariis, &c. AD RESPONDENDUM C. SIMUL CUM D. de tantâ terrâ, &c. quam idem C. in curiâ nostrâ clamat, &c. et sine quibus prædictus D. non vult respondere eidem C. cum prædicti, &c. sint participes ipsius D. de terrâ prædictâ, &c.* Should they appear, they might answer together with the tenant; but if they declined answering, the plea still pro-

(a) Bract. 429.

ceeded; and whether they appeared or not, the tenant, if he lost, would be intitled to contribution. If the inheritance was not divided, then all the parceners must be made parties; but upon a plea that there were other parceners, the demandant might reply such matter as would disable them from claiming any right, and therefore as not being persons who need be named in the writ, the same as was before said in the case of a demandant (a).

If there was no plea to the person, either of Plea to the action. the demandant or tenant, the next consideration was such as might arise upon the matter itself. The thing in demand ought to be stated with certainty; in which the count or declaration, or, as Bracton calls it, the *intentio*, or *narratio*, should correspond with the writ (b). Perhaps the tenant in the action was not tenant of the land, or was tenant only of a part; or perhaps he held it only in the name of another. Thus he might hold it in ward, *in vadium*, at will, or for term of years; in either of which cases the writ should be brought not against him, but against the person in whose name he was seised; and if this was pleaded, it would abate the writ (c). In such case he might plead, generally, *non tenet*, or that the Non tenure. freehold was not in him. If he put himself upon the country for the truth of such a plea, and it was found against him, he would lose the land in question, as a penalty for his false plea: the same, if he said he did not hold it, but another did. But if he admitted that he held part, and said that another held the rest, and this was found against him, he did not lose the whole, nor a part, on account of his false plea, but the suit went on, and he was to answer for the whole. He might plead that he once held the land, but that he did not at the present time (d). If this was owing to an alienation before the purchase of

(a) Bract. 430.

(b) Ibid. 431.

(c) Ibid. 431 b.

(d) Ibid. 432.

the writ, no fraud could be objected; nor indeed, if after the purchase, provided he was ignorant of the writ. In some cases the alienation might be even after the summons, without being fraudulent; as if he went beyond sea either before or after the purchase of the writ, not being prevented by the summons, and knowing nothing of it, and there made an alienation: but if neither of the beforementioned cases could be proved, and especially if the alienation was after the summons had been testified and proved, he was considered as the real possessor, and was to stand to the suit as tenant (a).

He might plead that he held only so many acres, whereas the demandant claimed so many; upon which an inquisition might be had by a writ to the sheriff, directing him to summon four, six, or more of lawful men of those who made the view, and by them to make inquiry whether the tenant held so many or so many acres. Again, in a plea of *non tenet*, if the tenant had before confessed in the county court, that he held the whole, a writ went to the sheriff, commanding him to make a record of the plea in which such confession was made (b). If the demandant, after a plea of *non tenet*, made a *retraxit*, and commenced a suit against another, the tenant would not suffer any penalty for his false plea (c). Exception might be made to the name of the *vill*, any mistake in which would be an incurable error (d).

Another part of the writ, or count, to which an exception might be made, was the claiming the land *ut jus meum*.

Majus jus. To this the tenant might answer, that he had *majus jus*; and this issue would be tried by the great assise, or duel, as the tenant pleased. It has been before shewn, that the best title, in the law, was where the *jus possessionis* and *jus proprietatis* were united, which was therefore called *droit droit*; and it was a maxim, that whoever had the *jus proprietatis* ought to have the pos-

(a) Bract. 432. b. (b) Ibid. 433. (c) Ibid. 433. (d) Ibid. 434.

session. *Possessio sequitur proprietatem*, but not *vice versâ*. The *proprietas* might be separated from the *possessio*, in this manner; upon the death of the ancestor, the *proprietas* immediately descended to the next heir, whether he was present or not; but not being present, the *possessio* might be obtained by another, who put himself into seisin; by virtue of which the *jus possessionis* would descend to his heirs, through the negligence of him who had the *proprietas*. Thus, while the *jus proprietatis* descended on the elder brother, the younger brother might obtain seisin and die seised, transmitting to his heirs, together with the *jus possessionis*, which he himself had, a sort of *jus proprietatis* (a); so that there would be two *jura proprietatis* in different persons by different descents; but one, as the descendants of the elder brother, would have *MAJUS JUS proprietatis*, on account of the priority; and those from the younger brother *minus jus*; yet the *possessio* of the latter would prevail, till the former evicted them of the *jus proprietatis*.

Another plea which the tenant might plead was, that the demandant, or one of his ancestors, had released to the tenant, or some of his ancestors from whom he derived the *jus possessionis*, and quit-claimed for himself and his heirs by a fine made in the king's courts (b); or that the demandant or some ancestor lost the land in question, in judgment in an action *de proprietate*, as by the great assise or duel, or a jury, on which he had put himself; and these pleas were to be proved by the record of the justices.

If the demandant or any of his ancestors had been apprised of any litigation, or final concord made concerning their right, and had not put in their claim, this silence might be pleaded against the demandant to a writ brought to establish such right. The

Release.

Fine and non claim.

(a) Bract. 434. b.

(b) Ibid. 435.

manner of making a claim was simply by the words (a), *appono clameum meum*; or, what had the same effect, by commencing a suit; a fact like this being a stronger proof than a mere claim, that he did not mean to abandon his pretensions. This claim was to be made pending the plea, and the making of the *cyrographum*, or before judgment, provided he was in court at the time, or in the kingdom within the four seas; and in such case, ignorance was no excuse: nor, says Bracton, as it should seem, would he afterwards be heard; for if it was a fine, the time taken up by the pendency of the action afforded, at least, a month for putting in a claim; for the summons ought to be served fifteen days at least, that being what was called reasonable summons; and the *cyrographum* used not to be allowed at the return of the writ, but a day was given at fifteen days at least, when the *cyrographum* was to be taken; during all which time there was sufficient opportunity to make claim. Indeed a month was the period which Bracton says was limited for this purpose, *secundum communem provisionem regni*; and therefore he calls it the legal time for making the *cyrographum*; so that if it was made before, it was fraudulent, and no claim need be made to invalidate it (b). The place to make claim was in the king's court, at the time of passing judgment, or before.

However, there were certain causes of excuse, which would protect a party from the consequence of having omitted to make his claim; as, if at the time of the fine and making the *cyrographum*, the person who ought to make the claim was within age, or *non sanæ mentis*; if he was an idiot, born deaf and dumb, or the like. But when such person came to age, or recovered his senses, it was the opinion of some, that he ought to make that claim then, which he could not make before; and, according to some, if a minor did not do it within a year after he came of age, he would not be excused: yet Bracton says, that he was

(a) Bract. 435. b.

(b) Ibid. 436.

excused, though he made no claim within that time, and that a claim need not be made at all, and would have no avail after judgment passed, or the delivery of the *cyrographum*. A person who was in prison at the time of the suit, or detained by such a disorder as did not allow him either to come or send, would be excused; as would also, for the same reason (a), a person who was restrained by force, even out of prison. A married woman, even though she might send, would be excused, as *sub potestate viri*; so that all sorts of impotence seemed sufficient excuse; and upon this idea, a person who was *ultra mare* at the time was excused: and none of these, according to Bracton, need make any claim after those impediments were removed, if judgment was passed, or the *cyrographum* delivered.

Another case in which a party was excused, though he made no claim, was, where the fine, according to the words of Bracton, *ipso jure sit nullus*; as if it was made of a tenement in the possession of another person, perhaps of the person himself to whom it was objected that he made no claim, or some ancestor, and not of him (or his ancestor) who pleaded the fine (b); or if the fine was made by any collusion or fraud, or in any way so to the prejudice of another, as that it ought not in justice and equity to hold good. A person would likewise be excused, if there was no *cyrographum*; or if a disseisor made a feoffment and then a fine, such a fine might be revoked and made void: so, if at the time of the suit, neither himself nor his ancestors had any title to the tenement in question; or if the ancestor who ought to have made the claim, was not an ancestor through whom any right could descend to the person against whom the fine was pleaded. Bracton says, that notwithstanding a fine and *cyrographum* might seem *primâ facie* to be revocable in many cases, because the person making it was only tenant for life, in dower, and

(a) *Ubi eadem ratio, ibi idem jus.*

(b) Bract. 436. b.

the like, or because the land in question was held in villenage; yet all persons were in law bound by this judgment; and therefore, if they made no claim, they would not be excused. In short, it is declared by Bracton, that no person should be excused if he was in the kingdom, *infra quatuor maria*, and had it in his power to come or send; so that even a person *in languore* would not be excused, because he might send (a). If a person was *in servitio regis*, so as he could neither come nor send, he was excused, although he made no claim. Thus stood the law upon the subject of claim, to suspend the effect of a judgment or fine.

From the manner in which Bracton speaks of a fine, it should seem as if this judicial concord was entered into after a proceeding was commenced on any writ whatsoever, which was grounded on the *proprietas*; and that it was not confined to a writ of covenant, grounded upon the breach of a supposed prior agreement and concord: it seems particularly to have been made in a writ of right, and is all along mentioned in company with a judgment therein, upon the great assise or duel.

Of personal actions. We have now dismissed the subject of real actions, through all their parts and kinds. It remains to add something on the nature of process in actions personal. These, like real actions, were commenced by summons; but if a defendant omitted to appear upon a lawful summons, the contempt was treated in a different manner; for they proceeded by attachment, as appeared in Glanville's time (b). Personal actions differed likewise in their process, according to circumstances: in some causes, which from their nature would not bear delay; as where the subject was the fruits of the earth or other things, which were perishable; the *solennitas attachia-*

(a) Bract, 437.

(b) Vid. ant. 121.

mentor, as it was called, was dispensed with (a): so again, where the lapse of a benefice was apprehended, or where the injury was very atrocious, or the plaintiff deserved a particular respect or privilege; as noble persons, or merchants who were continually leaving the kingdom. But in personal actions which did not require such special favour, if the defendant did not appear to the summons, and the plaintiff offered himself in court the first, second, third, and fourth day, he was not to be waited for any longer; but, whether the summons was proved or not, so as it was not openly denied, he was to be attached by pledges. Upon which the entry on the roll was thus: *A. obtulit se quarto die versus B. de placito*; then the substance of the writ was added; and it went on, *et B. non venit, et summonitus, &c. Judicium, Attachietur quòd sit coram, &c.* The writ of attachment was, *Pone per vadium et salvos plegios B. quòd sit coram, &c. ad respondendum de placito*; and then followed the substance of the writ as upon the roll. The following instances of such entries upon the roll are given by Bracton: *De placito quare non tenet ei conventionem inter eos factam, or finem inter eos factum de, &c.—De placito quòd warrantizet ei tantam terram cum pertinentiis, &c.—De placito quare non facit ei consuetudinem et certa servitia, quæ facere ei debet, &c.—De placito quòd reddat ei tantam pecuniam quam ei debet et injustè detinet, &c.—De placito quare idem B. simul cum aliis venit* Attachment. *ad domum suam, et ibi did such a trespass, contra pacem nostram.* Thus the attachment pursued the nature of the original writ; and at the end was added this clause: *Ad ostendendum quare non fuit coram, &c. sicut summonitus fuit*: or if he had essoined himself to a particular day, then, *ad ostendendum quare non servavit diem sibi datum per essioniatorem suum, &c.* to which he was to answer before he answered to the principal point; and if

(a) Bract. 439.

he could not excuse himself, he was to be *in misericordiā* for his default.

If he did not appear after this first attachment, then, upon the plaintiff offering himself, he was to be attached by better pledges, to answer on another day: this was called *aforciamantum plegiorum*, and was in the nature of distress for service, where, if the party appeared not at the first distress, more cattle were taken *pro aforciamento districtio- nis* (a). The entry on this occasion was, *A. obtulit se quarto die versus B. de placito, &c.* as before; *et B. non venit, et aliàs fecit defaultam postquam fuit summonitus; et ita quòd attachiatus tunc fuit per C. et D. Judicium, Ponatur per meliores plegios quòd sit, &c.* upon which there issued a second attachment, in which was likewise contained a summons against the former pledges, to shew cause why they did not produce the defendant, as they had engaged to do. If neither the defendant nor pledges appeared to this writ, all the pledges were *in misericordiā* and not the defendant; but then all the defaults fell upon the defendant, as if he had found no pledges at all; and a writ issued, *quòd sit ad audiendum judicium suum de pluribus defaultis*; and from that day all aforcement of pledges ceased. If the defendant appeared to the second attachment, then only the first (and not the second) pledges were to be amerced, unless they shewed cause why they did not produce him at the first attachment. However, though the defendant was not to be amerced, but summoned to hear judgment on his defaults, yet Bracton thinks it was otherwise in regard to a plaintiff who had found pledges *de proseguendo*, and did not prosecute his suit; for, according to him, they were all to be amerced, as well the principal as the pledges.

If, at the first day of summons and attachment, neither defendant nor plaintiff appeared, the plaintiff did not, however, lose his writ. When the defendant had been attached by better pledges, and did not come to his day, nor

(a) Bract. 439.

within the fourth day, and the plaintiff did (a), the entry was thus: *A. obtulit se quarto die versus B. et B. non venit, &c. et plures fecit defaultas, ita quòd primò attachiatus fuit per C. et D. et secundò per E. et F. et ideò omnes plegii in misericordiâ*; and then the process above alluded to issued against the defendant, commanding the sheriff, *quòd habeas coram, &c. corpus B. ad respondendum A. de placito, &c. ad audiendum judicium suum de pluribus defaultis, &c.* If he came at the day and could not save his defaults, he was to be amerced for them, and then to answer to the action. If he did not appear, but concealed himself, or, as they called it, *latitaverit*, so that the sheriff returned, *he was not to be found in his bailiwick*; then the entry was thus: *A. obtulit se quarto die versus B. de placito, as before; et B. non venit, et plures fecit defaultas, ita quòd præceptum fuit vicecomiti, quòd haberet corpus ejus; et vicecomes mandavit, quòd non fuit inventus in ballivâ suâ, et ideò vicecomes distringat eum per omnes terras et catalla, quòd sit ad, &c.* upon which there issued a writ of *distringas* against his lands and chattels. If he did not appear to this writ, his default was punished by another writ of *distringas*, commanding the sheriff to distrain his lands and goods, *et quòd sit securus habendi corpus ejus* at another day. If he still made default, the next *distringas* was, *ita quòd nec ipse, nec aliquis pro eo, nec per ipsum manum apponat in terris, tenementis, bladis, nec in aliis catallis.* If he still made default, the next *distringas*, if it could be so called, was, *quòd capiat omnes terras et omnia catalla in manum domini regis, et capta in manum domini regis detineat, quousque dominus rex aliud inde præceperit, et quòd de exitibus respondeat domino regi*: and beyond this there was no further process *per terras et catalla*; they being both taken into the king's hands by the sheriff, who was to answer for the profits to the crown.

(a) Bract. 440.

What step was to be taken by the plaintiff who had suffered all these delays? for it was hard that, after all, he should lose the effect of his suit. Bracton thinks that in this, there was a difference between actions upon a contract for a sum of money, and for a trespass. In the former, he thought it would be right to adjudge to the plaintiff a seisin of the chattels to the amount of his demand, and to give him a day, and summon the defendant; when, if he appeared, the chattels should be restored, upon his answering to the action: if he did not appear, he should not be heard upon the matter, but the plaintiff should become lawful owner thereof. But if it was an action of trespass (*a*), then he thought, the justices should estimate the damage sustained; and the rents and chattels of the fugitive being valued, a portion should be taken into the king's hands to the amount of the damage, as a penalty on the defendant.

Should the defendant, however, not be found, nor have any land or goods, he did not wholly escape the resentment of offended justice; for whether it was an action for money, or a trespass, the defendant was to be demanded from county to county, at the suit of the plaintiff, till he was outlawed. Persons so outlawed were not, upon their return, or being taken, to lose life or limb, as those outlawed for crimes; but were condemned to perpetual imprisonment, or to abjure the realm.

Execution of
the writ.

It sometimes happened that the sheriff did not execute the attachment, nor return the writ; and then, upon the plaintiff offering himself, the entry was thus: *A. obtulit se quarto die versus B. de placito, &c. et B. non venit, et præceptum fuit vicecomiti, quòd attachiaret eum, quòd esset ad talem diem, et ipse vicecomes inde nihil fecit, nec breve quod ei inde venit, misit; et ideò præceptum est vicecomiti, sicut aliàs, quòd attachiaret*

(*a*) Bract. 440. b.

eum, quòd sit ad, &c. et quòd ipse vicecomes sit ibi auditurus iudicium suum de hoc quod prædictum, &c. non attachiavit, nec breve quod ei inde venit, misit, sicut ei præceptum fuit. Upon this there issued an *aliàs* attachment: *Præcipimus tibi, sicut ALIAS tibi præceperimus, &c. (a).* If the sheriff did nothing upon this writ, nor shewed any sufficient excuse, he was amerced for his contempt, and was commanded a third time to attach the party: *Præcipimus tibi, sicut SÆPIUS præceperimus, &c.*

Sometimes the sheriff sent an excuse for not executing the writ. He would sometimes return, that the writ came too late to be executed; that the party was not to be found in his bailiwick; that he was wandering from county to county, and had no certain residence; that he had no lands or chattels by which he might be distrained; and many other excuses might be feigned. Again, should the sheriff err in the sort of attachment; as when he was to take pledges should he make a distress; or, instead of taking the person, should he admit to bail; in all such cases it was usual to make an entry of the return, and to specify it in the writ that issued in consequence thereof: as for instance, *et B. non venit, et vicecomes mandavit, quòd non attachiavit eum, quia recepit breve tam tardè quòd præceptum domini regis exequi non potuit:* and if it was proved that he received the writ in good time, or in the county court, and might have executed it, the record went on, *Et testatum est, quòd istud recepit satis tempestivè (or, in comitatu ubi attachiandus præsens fuit), et ideò præcipiatur quòd, &c.* Upon this a writ issued, commanding him to attach the party (*b*), and appear himself to answer for his default; and if he failed in either, he was *in misericordiâ*. A sheriff was sometimes excusable for not executing process by reason of some liberty which he could not enter, because the lord thereof had the *retorna brevium* therein. In such case, the

(a) Bract. 441.

(b) Ibid. 441. b.

sheriff was to command the bailiff of the liberty to execute it; and if he did not do it, the sheriff was excusable before the justices, by making a return, *quòd præceptum est ballivo*. When the bailiff thus failed in doing his duty, the sheriff was then commanded not to omit doing it by reason of that liberty; under which special warrant the sheriff had an authority that did not generally belong to him. The entry upon the record was, *Et vicecomes mandavit, quòd præcepit ballivis libertatis, et ipsi nihil inde fecerunt, et ideò præceptum fuit vicecomiti, quòd NON OMITTAT PROPTER LIBERTATEM quin, &c.* and there issued a writ *quòd non omittas*, containing an attachment, *distringas, habeas corpus*, or whatever the necessary process might be, by which also the bailiff of the liberty was summoned to shew cause for his neglect (a).

If the sheriff was resisted in the execution of this writ by the bailiff or lord of the franchise, there issued another *non omittas*, with a clause authorizing him to go, with some sufficient knights and free men of the county, and take the bodies of such as resisted them, and keep them in prison till the king's pleasure was known concerning them: the lord of the liberty was likewise attached to appear and answer for the offence; and if he could not deny it, his liberty was seized into the king's hands for such an abuse of it.

A sheriff might say that the person was a clerk, and claimed the privilege of a clerk not to find pledges, and that he had no lay fee by which he could be distrained. It seems from Bracton, that in such case they did not proceed directly against a clerk, particularly in trespasses; but the course was to resort to the archbishop, bishop, or other in whose diocese the person to be attached resided, or had an ecclesiastical benefice, and require him, *quòd faciat, &c. clericum venire* (b). If the bishop neglected to obey this writ, he was summoned to answer for his default; to which if

(a) Bract. 442.

(b) Ibid. 442. b.

he made no appearance, there run against him all the *solennitas attachiamentorum*, as in other distresses, and he was immediately distrained by his barony (a): and if neither the bishop appeared nor the clerk, then they proceeded by judgment of the court against the clerk, who was arrested and detained till he was demanded by the bishop. At any rate, it was expected, a bishop, who held a barony of the crown, should obey the king's writs; and if a clerk did not appear, the bishop might bring or send an excuse, why he had not the clerk according to the requisition of the writ: he might say, that he had no benefice in his diocese by which he could be distrained; or if he had a benefice, he might say, that he was a student at Paris beyond the sea, that he did his utmost in sequestering him by his prebend and other benefices, and could do no more in the way of compulsion. This would be a complete justification for the bishop, and all process would cease till the clerk returned, and could be taken; and then, if the bishop omitted, the sheriff might proceed as above mentioned (b).

It was said before, that in some personal actions the *solennitas attachiamentorum* was not to be observed, and this was in several cases of privilege, as, in addition to those that have been already mentioned, where the plaintiff was a crusader or a merchant, whose affairs demanded dispatch; where there was some urgent necessity; as in cases of *darrein presentment*, *quare impedit*, and *non permittit*, lest the plaintiff should incur the lapse of six months; where the subject in contest was a perishable article, as ripe fruit, or, in an action of trespass, where the injury was atrocious, and against the king's peace; where regard was to be had to the quality of the person injured, as the king, queen, or their children, brothers, sisters, or any of their relations or kin; in any of the above cases, it was usual, in the first instance, to have a ^{writ} to the sheriff, *quòd habeat corpus, &c. ad*

(a) Bract. 443.

(b) Ibid. 443. b.

respondendum. But this writ against the body, instead of the clause *ad audiendum judicium de pluribus defaultis* (which would have been absurd), had one, containing the cause wherefore the formality of attachment was dispensed with; as, *Præcipimus tibi, quòd, omni occasione & dilatione postposita, propter privilegium mercatorum, quorum placitum instantiam desiderat, habeas, &c.* and so in other cases. But, notwithstanding this intention to avoid delays, the defendant might have an *essoìn de malo veniendi*, before he appeared (a). In capital cases, there was no attachment but that *per corpus*; and any one, with or without a precept, might arrest such an offender (b).

In mixt actions, as those for dividing a common, *de pro parte sororum*, of *partition*, and the like, the usual process was, distress real, and not distress personal.

Thus far Bracton speaks of the commencement of mixed and personal actions; but, notwithstanding the full manner in which he has treated the whole proceedings in real actions, he leaves these without any further discussion (c). The small proportion that personal property bore to real, in these days, might be a reason why the remedies provided for the recovery of it should have undergone very little consideration. Consistently with the inferior light in which personal property was held, it is probable, that the nature of personal actions had not been much refined upon: we shall see in the following part of this History, how they gradually grew into notice, and at length became equally important with real actions. It is to be lamented that our author passes over with the same silence the redress to be obtained by a writ of error; the practice of which must be collected from authorities of a later period.

(a) Bract. 444.

(b) Ibid., 444. b.

(c) Vid. ant. 459.

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